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ALEXANDER L. STEVAS,
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Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD M. NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW AND
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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Petitions for Certiorari Filed May 14 and December 11, 1980
Certiorari Granted June 22, 1981

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CIVIL DOCKET

United States District Court for the District of Columbia

C. A. No. 178-74

ERNEST FITZGERALD

vs.

ROBERT C. SEAMANS, JR., *et al*

RECORD REFERENCE NUMBER	DATE	PROCEEDINGS
	1974	
1	Jan 25	Complaint, appearance Jury demand
2	Jan 25	Summons, Copies (9) and Copies (9) of Complaint issued;
3	Feb 15	MOTION by defts. #1, 2, 4, 5, 6, 7, and 9 for enlargement of time; P&A's; c/m Appearance of Robert S. Rankin, Jr.
4	Feb 20	SUMMONS, copy (1) and copy (1) of complaint issued to deft. #1:
5	Feb 20	SUMMONS, copy (1) and copy (1) of complaint issued to D.A.:
6	Feb 22	RESPONSE by pltf. to defts. motion for enlargement of time to answer; c/s 2-22-74.
7	Feb 27	MOTION by pltf. to take depositions by other than stenographic means; memorandum; c/s 2-27-74.
8	Feb 28	SUMMONS, copy (1) & copy (1) of Complaint issued to deft. #8: served.
9	Mar 8	SUPPLEMENTAL memorandum of points and authorities by defts in support of motion for enlargement of time; c/m 3-8-74.

Record Reference Number	Date	Proceedings
	1974	
10	Mar 8	OPPOSITION by defts. #1, 2, 4, 5, 6, 7, and 9 to pltfs. motion to take deposition by other than stenographic means; P&A's; exhibit A; c/m 3-8-74.
11	Mar 18	MOTION by defts. #3 and 8 for enlargement of time; P&A's c/m 3-18-74.
12	Mar 20	ORDER granting motion of defts. Melvin R. Laird and Durwood L. Crow, #3 and 8, for enlargement of time; extending time through 4-22-74 within which said defts. may respond to the complaint. (N) Gesell, J.
13	Mar 26	NOTICE by pltf. to take depositions of Carl S. Wallace, Michael Ross, John Badin, Jr., Eugene L. Kirschbaum, David Wilson, Alexander P. Butterfield; Ronald Zeigler; appendix; c/m 3-26-74.
14	Mar 26	ORDER granting motion by defts. #1, 2, 4, 5, 6, 7 and 9 for enlargement of time and extending time through 4-22-74 within which they may respond to the complaint. (N) Gesell, J.
15	Apr 1	MOTION by defts. for protection order; P&A's; c/s 4-5-74.
16	Apr 5	OPPOSITION by pltf. to defts. motion for protective order; c/s 4-5-74.
17	Apr 9	ORDER granting motion of defts. for protective order to the extent that discovery is stayed until defts. have answered the complaint or have moved for dismissal or summary judgment; vacating pltfs. notice to take depositions. (N) Gesell, J.
18	Apr 10	ORDER denying motion of pltf. to take depositions by other than stenographic means. (N) Gesell, J.
19	Apr 22	MOTION by defts. for enlargement of time; P&A's; c/m 4-22-74.

Record Reference Number	Date	Proceedings
	1974	
20	Apr 29	MOTION by defts. #1, 2, 3, 4, 5, 6, 7, 8, and 9 to dismiss, or in the alternative, for summary judgment; exhibit 1, 2, 3, 4, attachment A, B, exhibit 5, 6, attachment A, B, C; exhibit 7, attachment A, B, C; exhibit 8, attachment A, B, C, D, exhibit 9, exhibit 10, exhibit 11, 12, 13, 14, attachment 1, 2, 3, 4, 5, 6, 7, 8; exhibits 15 & 16, statement; P&A's; attachment; 4-29-74.
21	*Apr 24	ORDER granting motion of defts. for enlargement of time through 4-29-74 within which to answer the complaint. (N) Gesell, J.
22	May 6	NOTICE by pltf. to take deposition of deft. #4, Eugene L. Kirschbaum, and Carl S. Wallace; c/m 5-6-74.
23	May 6	FIRST request by pltf. for production of documents to deft. #4; c/m 5-6.
24	May 6	MOTION by pltf. for enlargement of time within which to respond to defts. motion to dismiss or, in the alternative, for summary judgment; P&A's; c/m 5-6-74.
25	May 7	ATTACHMENT (2) to motion by pltf. for enlargement of time.
26	May 7	ORDER granting pltf. through 7-8-74 within which to respond to motion by deft. to dismiss, or in the alternative, for summary judgment. No further extensions will be allowed. (N) Gesell, J.
27	May 10	MOTION by defts. for protective order; P&A's; c/s 5-10-74.
28	May 20	MEMORANDUM of points and authorities by pltf. in opposition to defts. motion for protective order; affidavit of A. Ernest Fitzgerald; c/s 5-19-74.
29	May 22	SUPPLEMENTAL points and authorities by defts. in support of motion for protective order; c/m 5-22-74.

Record Reference Number	Date	Proceedings
	1974	
30	Jun 4	ORDER denying motion of defts. for a protective order. (N) Gesell, J.
31	Jun 10	AFFIDAVIT of service by John Bodner, Jr. on Captain Bruce E. Clark on 6-6-74; attachment.
32	Jun 13	STIPULATION extending time through 6-14-74 within which defts. may respond to pltfs. subpoena, APPROVED. (N) Gesell, J.
33	Jun 18	STIPULATION extending time through June 20, 1974 within which deft. may respond to subpoena dated 6-6-74, APPROVED. (FIAT) (N) Gesell, J.
34	Jul 8	MOTION by pltf. for extension of time; P&A's; c/s 7-8-74.
35	Jul 9	ORDER granting motion of pltf. for an extension of time through 7-19-74 within which to respond to motion for summary judgment. (N) Gesell, J.
36	Jul 16	CERTIFICATE of mailing by pltf.; attachments (2); c/s 7-16-74.
37	Jul 19	DEPOSITION of Carl S. Wallace for pltf.; exhibit 1; exhibit 2; exhibit; exhibit 5; exhibit 6; exhibit 7; exhibit 8.
38	Jul 22	DEPOSITION of Eugene L. Kirchbaum taken on June 6, 1974 for the pltf.; Exhibits 1 through 6; attached.
39	Jul 22	MEMORANDUM of pltf. in opposition to defts' motion to dismiss or, in the alternative, for summary judgment; Statement of Genuine Issues; Affidavit of pltf. in support of opposition; Attachments A thru H; Affidavit of John Bodner, Jr. with attachment; Affidavits (3); c/s 7-22-74.
40	Jul 22	ORDER granting motion of pltf. extending time through 7-22-74 within which pltf. may respond to motion of defts. to dismiss or in the alternative for summary judgment. (N) Gesell, J.

Record Reference Number	Date	Proceedings
	1974	
41	Aug. 9	DEPOSITION of Alexander P. Butterfield taken on June 15, 1974 for the pltf; attachment.
42	Aug. 9	DEPOSITION of Alexander P. Butterfield taken on June 12, 1974 for the pltf; attachment.
43	Aug 23	SUPPLEMENTAL points and authorities of deft. in support of motion to dismiss or, in the alternative, for summary judgment; c/m 8-23-74.
44	Sep 16	SUPPLEMENTAL affidavit by pltf. in support of opposition to defts. motion to dismiss, or in the alternative, for summary judgment; affidavit of A. Ernest Fitzgerald; c/s 9-16.
45	*Sep 13	MOTION of deft. to dismiss or in the alternative for summary judgment on the statute of limitations issue only, heard and taken under advisement. (Rep: I. Watson) Gesell, J.
46	Sep 20	RESPONSE by defts. to the supplemental affidavit of A. Ernest Fitzgerald; c/s 9-20-74.
47	Sept 24	SUPPLEMENTAL submission by pltf. in opposition to defts. motion to dismiss, or in the alternative, for summary judgment; c/s 9-24-74.
48	Oct 3	SUPPLEMENTAL submission by plaintiff in opposition to defendants' motion to dismiss or in the alternative for summary judgment, c/ser 10/3.
49	Oct 9	REPLY by defts. to pltfs. supplemental submission in opposition to defts. motion to dismiss or in the alternative for summary judgment; c/s 10-9-74.
50	Oct 9	MEMORANDUM AND ORDER granting motion of defts. for summary judgment. (N) Gesell, J.

Record Reference Number	Date	Proceedings
	1974	
51	Dec 6	NOTICE of appeal by pltf. from Memorandum and Order of October 9, 1974. Deposit $5.00 by John Bodner and credited to U.S. Treasury. Copy mailed to U.S. Attorney and John M. Kelson.
	1975	
52	Jan 9	TRANSCRIPT of proceedings of 9-13-74, pages 1-52. (Rep: I. Watson); Court copy.
53	Jan 16	RECORD on appeal delivered to USCA on 1-15-75; receipt acknowledged. (75-1032)
	1977	
54	May 13	CERTIFIED copy of JUDGMENT USCA affirming judgment of the USDC as to all appellees except Butterfield, the summary judgment that the action against appellee Butterfield is time-barred is reversed, and the case, insofar as it pertains to appellee Butterfield is remanded for further proceedings. OPINION attached.
55	May 18	ANSWER of deft. #4 to complaint; c/m 5-18-77. Appearance of Rebecca Ross.
56	June 20	ORDER filed 6-16-77 directing pltf. to file an amended complaint by 6-25-77; directing Dept. of Justice upon receipt of said amended complaint to begin to solve the representational problems of the named defts.; pltfs. document discovery will begin immediately upon the filing of the amended complaint and setting hearing on motion of defts. pending preliminary motions and objections to discovery for 7-27-77 at 9:30 a.m. (N) Gesell, J.
57	Jun 27	AMENDED complaint by pltf. changing caption; trial by jury requested; exhibit A; c/s 6-27-77.

Record Reference Number	Date	Proceedings
	1977	
58	Jun 27	SUMMONS and copy of amended complaint issued to deft. Haldeman:
59	June 29	FIRST request by pltf. for production of documents to deft. #2; c/m 6-29-77.
60	June 29	NOTICE by pltf. to take deposition of the person or persons in the U.S. Dept. of Defense who are familiar with the books and records called for by the attached specifications; schedule A; c/m 6-29-77.
61	June 29	NOTICE by pltf. to take deposition of the person or persons in the White House who are familiar with the books and records called for by the attached specifications; schedule A; exhibit A; c/m 6-29-77.
62	June 29	NOTICE by pltf. to take deposition of the person or persons in the U.S. Dept. of the Air Force who are familiar with the books and records called for by the attached specifications; schedule A; c/m 6-29-77.
63	June 29	FIRST request by pltf. for production of documents to deft. #3; c/m 6-29-77.
64	June 29	FIRST request by pltf. for production of documents to deft. #1; c/m 6-29-77.
65	July 12	NOTICE by pltf. to take deposition of person or persons in the GSA who are familiar with books and records called for by the attached specifications; Schedule A; exhibit A; c/m.
66	July 15	PARTIAL response by defts. to subpoenas duces tecum; c/s 7-14-77.
67	July 15	OBJECTIONS by defts. to subpoenas duces tecum; c/s 7-14-77.
68	Jul 25	REPLY of pltfs. to the Government's objections to subpoenas Duces Tecum and Partial response to subpoenas duces Tecum; Exhibits A thru E; c/m 7-25-77.

Record Reference Number	Date	Proceedings
	1977	
69	July 27	RESPONSE by deft. #2 to pltfs. first request for production of documents; c/m 7-26-77.
70	July 27	RESPONSE by deft. #1 to pltfs. first request for production of documents; c/m 7-26-77.
71	July 27	RESPONSE by deft. #3 to pltfs. first request for production of documents; c/m 7-26-77.
72	July 27	STATUS CALL. Further status call and hearing on motions set for 9-14-77 at 9:30 a.m. Government to file motions by 8-1-77. (Rep: I. Watson) Gesell, J.
73	July 27	LETTER dated 7-26-77 from government counsel filed.
74	Aug 2	MOTION by deft. #3 to dismiss amended complaint or in the alternative for summary judgment; motion by deft. #2 to dismiss amended complaint; post-remand P&A's in support of motions; attachment; c/m 8-1-77.
75	Aug 12	MOTION of pltff. for extension of time to respond to Gov'ts motions to dismiss amended complaint; c/m 8-12-77.
76	Aug 16	RESPONSE by defts. to pltfs. motion for extension of time; c/m 8-16-77.
77	Aug 17	ORDER extending time to 9-9-77 for pltf. to respond to motions to dismiss amended complaint. (N) Corcoran, J.
78	Aug 18	DEPOSITION of Steven Garfinkel for pltf. taken on July 15, 1977.
79	Aug 22	DEPOSITION of Edward Stafford Bridges II for pltf. taken on July 15, 1977.
80	Aug 22	DEPOSITION of Mrs. Marie Bouknight Allen for pltff. taken on 7-15-77.
81	Aug 29	DEPOSITION of Tom Graham Morgan for pltf. taken on July 15, 1977.

Record Reference Number	Date	Proceedings
	1977	
82	Aug 29	DEPOSITION of Martin Abraham Miller for pltf. taken on July 15, 1977.
83	Aug 31	DEPOSITION of William Eugene Roberts for pltf. taken on July 15, 1977.
84	Sept 2	AFFIDAVIT of Durward L. Crow; exhibit 1, affidavit of H.R. Haldeman; c/s 9-2-77.
85	Sept 9	MEMORANDUM by pltfs in opposition to defts motion to dismiss, or, in the alternative, for summary judgment; statement of material facts; c/s 9-9-77.
86	Sept 14	MOTION of defts. to dismiss or in the alternative for summary judgment heard and denied without prejudice. (Rep: I. Watson) Gesell, J.
87	Sept 14	APPEARANCE of Kenneth E. Krosin and John F. Bruce as counsel for plft.
88	Sept 27	TRANSCRIPT of proceedings of 9-14-77, pages 1-47. (Rep: I. Watson); Court copy.
89	Sept 28	SUPPLEMENTAL response by pltf. to defts. motion to dismiss or in the alternative for summary judgment; affidavit of A. Ernest Fitzgerald; attachments A-N; c/m 9-28-77.
90	Sept 30	PARTIAL Reply by defts. to response of pltf. to motion of deft. to dismiss or in the alternative for summary judgment; affidavit of Charlotte Anne Reid; Attachments 1 thru 3; c/m 9-30-77.
91	Oct 7	TRANSCRIPT of proceedings of July 27, 1977, pages 1-28. (Rep: I. Watson); Court copy.
92	Oct 11	SUPPLEMENTAL reply of defts. to pltfs. supplemental response to defts. motion to dismiss, or in the alternative, for summary judgment; affidavit of Duward L. Crow; affidavit of William Woodruff; attachment W-1; c/m 10-11-77.

Record Reference Number	Date	Proceedings
	1977	
93	Oct 14	ORDER filed on 10-13-77 granting motion of deft. Duward L. Crow for summary judgment. (N) Gessell, J.
94	Nov 9	MOTION of pltf. for recusal of trial judge; memorandum of P&A's; affidavit of bias of A. Ernest Fitzgerald; affidavit of John Bodner, Jr.; attachment; certificate of counsel; c/m 11-9-77.
95	Nov 10	MOTION of pltf. for reconsideration of order of 10-13-77; memorandum of P&A's; affidavit of A. Ernest Fitzgerald; attachments A-Q; c/m 11-10-77.
96	Nov 15	OPPOSITION of defts. to pltfs. motion for recusal of trial judge; affidavit of Rebecca L. Ross; affidavit of Alexis Panagakos; attachment memorandum; c/m 11-15-77.
97	Nov 25	OPPOSITION of defts. to pltfs. motion for reconsideration; memorandum; c/m 11-25-77.
98	Nov 29	NOTICE of plft. to take deposition of person or persons in the CSC who are familiar with the books and records called for by the attached specifications; attachment; c/m 11-29-77.
99	Nov 29	REPLY of pltf. to defts. opposition to motion for recusal of trial judgment c/s 11-29-77.
100	Dec 2	NOTICE of defts. of substitution of corrected filings to memo in opposition to pltfs. motion for reconsideration filed on 11-25-77; affidavit of Alexis Panagakos; c/s 12-2-77.
101	Dec 6	ORDER filed 12-2-77 denying motion of pltf. for reconsideration of order of 10-13-77. (N) Gesell, J.
102	Dec 6	ORDER filed on 12-2-77 denying motion of pltf. to recuse trial judge. (N) Gessell, J.

Record Reference Number	Date	Proceedings
	1977	
103	Dec 14	NOTICE of pltf. to take deposition of the person or persons in the Civil Service Commission who are familiar with the books and records called for by the attached specifications; Schedule A; attachment; c/m 12-14-77.
104	Dec 14	STATUS REPORT on pltfs. discovery; attachments A-D; exhibits A-C; attachments E and F; c/m 12-14-77.
105	Dec 21	WITHDRAWAL of appearance of Rebecca L. Ross as counsel for defts.; c/m 12-21-77. CD/N
106	Dec 30	STIPULATION approved whereby the parties and the CSC agree that the notice of deposition and subpena duces tecum served on the CSC returnable 12-23-77 is stayed and returnable instead on 12-30-77. (N) (FIAT) Gesell, J.
	1978	
107	Jan 11	DEPOSITION of Llewellyn M. Fischer taken on 12-16-77 for pltf.
108	Feb 8	APPEARANCE of E. Barrett Prettyman, Jr., Curtis E. Von Kann, Peter Raven-Hansen, Sharon M. Williams and the firm of Hogan & Hartson as counsel for pltf.; c/m 2-8-78.
109	Feb 16	WITHDRAWAL of William L. Sollee as counsel for pltf.; c/m 2-16-78.
110	Feb 16	WITHDRAWAL of John Bodner, Jr. as counsel for pltf.; c/m 2-16-78. CD/N
111	Mar 8	APPEARANCE of Jonathan B. Smith as counsel for defts.; appearance of Alexis Panagakos as counsel for defts.; appearance of Mark S. Landman as counsel for defts.; c/s 3-8-78.

Record Reference Number	Date	Proceedings
	1978	
112	Mar 15	STATUS CALL. Motion of pltf. for production of documents to be filed by 4-19-78; defts. to respond by 4-19-78. Hearing on motions set for 5-5-78 at 9:30 a.m. Further status call set for 4-3-78 at 9:30 a.m. (Rep: I. Watson) Gesell, J.
113	Mar 27	STIPULATION AND ORDER filed on 3-22-78 re handling of Air Force Oral History Project transcript. (N) Gesell, J.
114	Mar 30	MEMORANDUM by pltff. concerning pltff's subpoena duces tecum for certain White House Tape Recordings; c/s 3-30-78.
115	Apr 3	SUPPLEMENTAL memorandum of pltf. concerning subpoena duces tecum for certain White House tape recordings; c/s 3-31-78.
116	Apr 3	STATUS CALL. Discovery re two (2) tapes to go forward. (Rep: I. Watson) Gesell, J.
117	Apr 5	MOTION of pltf. for *in camera* inspection of documents; memorandum.
118	Apr 5	MOTION of pltf. to compel production of documents pursuant to pltfs. subpoenas duces tecum; memo of P&A's.
119	Apr 11	MOTION of Richard Nixon for leave to file memorandum as amicus curiae; memorandum; exhibit.
120	Apr 14	TRANSCRIPT of proceedings of 3-15-78, pages 1-44. (Rep: I. Watson) Court copy.
121	Apr 14	TRANSCRIPT of proceedings of April 3, 1978, pages 1-15. (Rep: I. Watson); Court copy.
122	Apr 19	FIRST interrogatories of defts. to pltf.; first request for production of documents.
123	Apr 19	RESPONSE of defts. to pltfs. motion for in camera inspection of documents.

Record Reference Number	Date	Proceedings
	1978	
124	Apr 25	OPPOSITION of defts. to pltfs. motion to compel production of documents; exhibit 1.
125	Apr 28	MOTION of pltf. for protective order; memo of P&A's.
126	May 1	RESPONSE of pltf. to defts. opposition to pltfs. motion to compel production of documents.
127	May 3	OPPOSITION of defts. to motion of pltf. for protective order.
128	May 10	NOTICE by defts. of *in camera* submission.
129	May 10	NOTICE by defts. of submission of transcripts.
130	May 5	MOTION of pltf. for production of documents argued, granted in part and denied in part. Motion of pltf. for a protective order heard and granted. Hearing for production of (further) White House documents set for 5-26-78 at 9:45 a.m. (Rep: I. Watson) Gesell, J.
131	May 15	ORDER filed on 5-9-78 granting motion for pltf. for *in camera* inspection of certain documents in possession of GSA; directing that the Archivist of the U.S. deliver copies of said documents to the court for inspection. (N) Gesell, J.
132	May 15	ORDER filed on 5-9-78 granting in part and denying in part motion of pltf. to compel production of 69 documents; certain documents to be supplied to pltf. by 5-10-78 at 10:00 a.m. (Signed 5-5-78)(N) Gesell, J.
133	May 23	TRANSCRIPT of proceedings of May 5, 1978, pages 1-85. (Rep: I. Watson); Court copy.

Record Reference Number	Date	Proceedings
	1978	
134	May 25	ORDER filed on 5-24-78 granting motion of pltf. for a protective order; directing that defts. first interrogatories be stricken without prejudice. (N) Gesell, J.
135	May 25	ORDER filed on 5-24-78 granting motion of Richard Nixon for leave to file memorandum as amicus curiae. (N) Gesell, J.
136	May 26	MOTION of pltf. for product ion of documents heard and taken under advisement. (Rep: I. Watson) Gesell, J.
137	June 9	ORDER filed 6-7-78 denying without prejudice pltfs. motion for in camera inspection and production of documents. (N) Gesell, J.
138	June 19	ORDER filed 6-16-78 directing that certain transcripts of White House tape recorded conversations be delivered to pltf. FORTHWITH; setting forth certain directives as to said transcripts; pltf. to file motion for leave to amend the complaint within 14 days from receipt of the transcripts. (N) Gesell, J.
139	June 29	TRANSCRIPT of proceedings of May 26, 1978, pages 1-47. (Rep: I. Watson); Court copy.
140	July 5	MOTION of pltf. for leave to file amended complaint adding Richard M. Nixon, Bryce N. Harlow and David Packard as party defts.; memo of P&A's; exhibit; verification; affidavit of A. Ernest Fitzgerald; exhibits A-Q.
141	July 5	SUPPLEMENTAL memorandum of P&A's in support of pltfs. motion for leave to amend his complaint. (Sealed pursuant to Court's order of 6-16-78 and taken to Courtroom Division.)
142	July 17	STIPULATION extending time through 7-21-78 within which defts. may respond to motion for leave to file amended complaint, SO ORDERED. (N) Gesell, J.

Record Reference Number	Date	Proceedings
	1978	
143	July 19	AFFIDAVIT of James B. Rhoads with attachments filed.
144	July 19	COPIES of Nixon Presidential Historical Materials filed and se-led in large brown envelope) by direction of Court. (Placed in locked file cabinet.)
145	July 19	TRANSCRIPT of tape recordings within the Nixon Presidential Historical materials filed and sealed by direction of the Court. (Placed in large brown envelope and placed in locked file cabinet.)
146	July 21	MEMORANDUM of P&A's of defts. in opposition to pltfs. motion for leave to amend his first amended complaint; exhibits 1-20.
147	July 21	SUPPLEMENTAL memorandum of P&A's of defts. in opposition to plfs. motion for leave to amend his complaint. (Sealed and taken to Courtroom Division.)
148	Aug 11	REPLY of pltf. to defts. opposition to pltfs. motion for leave to amend his first amended complaint; Appendix; affidavit of Clark R. Mollenhoff; list of exhibits; exhibits S, T, U, V, W, X, and Y. (Sealed and taken to Courtroom Division.)
149	Sept 8	MOTION of pltff. for leave to file amended complaint heard and granted in part and denied in part. Granting pltff. permission to add Nixon and Harlow as party defts. & denying motion as to adding Parkard as a deft. (Rep. Watson) Gesell, J.
150	Sept 14	ORDER denying pltfs. motion for leave to file amended complaint as to proposed deft. David Packard and other persons whose identities are at this time unknown to pltf.; no additional amendment to add parties will be granted; further ordered that pltfs. motion for

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		leave to file amended complaint is granted as to proposed defts. Richard M. Nixon and Bryce N. Harlow; and further ordered that the amended complaint as resubmitted in conformity with this order be deemed filed as of this date (N) Gesell, J.
151	Sept 14	AMENDED complaint adding Richard M. Nixon and Bryce N. Harlow as party defts.
152	Sept 19	SUMMONS (2) and copies (2) of amended complaint issued to defts. #3 and 4: #4 NF 10-11-78; #3 ser 10-27-78
153	Sept 20	FIRST interrogatories of defts. to pltf.
154	Sept 25	TRANSCRIPT of proceedings of 9-8-78, pages 1-48. (Rep: I. Watson); Court copy.
155	Sept 26	STIPULATION approved 9-25-78 extending time through 10-23-78 within which defts. Butterfield and Haldeman may respond to the second amended complaint, SO ORDERED. (N) Gesell, J.
156	Oct 12	SUMMONS and copy of second amended complaint issued to Dennis Dutterer, U.S. Atty: serv. 10-13-78.
157	Oct 16	STIPULATION approved extending time through 11-21-78 within which defts. Nixon and Harlow may respond to the second amended complaint. (N) Gesell, J.
158	Oct 16	STIPULATION approved extending time through 11-3-78 within which pltf. may answer first interrogatories. (N) Gessel, J.
159	Oct 23	RENEWED motion of defts. #1 and 2 to dismiss or, in the alternative, for summary judgement; memo of P&A's; exhibits 1-3.

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160	Oct 26	STIPULATION approved extending time through 11-17-78 within which pltf. may reply to the renewed motion to dismiss or in the alternative for summary judgment. (N) Gesell, J.
161	Nov 3	ANSWERS of pltf. to defts' first Interrogatories; Appendix
162	Nov 17	MOTION of pltf. for leave to file brief in excess of page limitations of local Rule 1-9(e); P&A; Exhibit-(Opposition to renewed motion of defts. Butterfield & Haldeman to dismiss or in the alternative for Summary Judgment; Statement & attachment) (EXHIBIT UNDER SEAL)
163	Nov. 21	MOTION of defts. #3 & 4 to dismiss or, in the alternative, for summary judgment; P & A; Table of Cases; Statement; Affidavit of Richard Nixon & Bryce N. Harlow as attachment 1 & 2; Attachments 3, 4, 5, 6,
164	Nov. 22	MOTION of pltf. for leave to file brief in excess of page limitations of Local Rule 1-9(e). (Fiat) Gesell, J.
165	Nov. 22	OPPOSITION of pltf. to renewed motion of defts. Butterfield and Haldeman to dismiss or in the alternative, for summary judgement; Table of Contents; Table of Authorities; Exhibit Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ.; Statement.
166	Nov. 29	STIPULATION approved 11-28-78 extending time through 12-15-78 within which pltf. may reply to the motion to dismiss or in the alternative for summary judgment filed by defts. Nixon & Harlow & extending time through 12-29-78 within which all defts. may reply to pltf.'s opposition to motions to dismiss or in the alternative for summary judgment. So Ordered. (N) GESELL, J.

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167	Dec. 15	OPPOSITION of pltfs. to motion to dismiss or, in the alternative, for summary judgment by defts. Nixon & Harlow; Table of Contents; Table of Authorities; Attachment; Supplemental statement
168	Dec. 20	STIPULATION approved extending time through 1-8-79 within which defts. may file opposition to motions to dismiss. (N) GESELL, J.
169	Dec. 27	REQUEST (first) of pltf. for production of documents to deft. Nixon.
170	Dec. 27	REQUEST (first) of pltf. for production of documents to deft. Harlow.
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171	**Jan. 8	MOTION of defts. for leave to file brief in excess of Page limitations of Local Rule 1-9(e); P & A; Exhibit.
172	Jan 10	ORDER granting motion of defts. to file reply to pltfs. opposition to renewed motion of defts. Butterfield and Haldeman to dismiss or, in the alternative for summary judgment and to pltfs. opposition to motion of defts. Nixon and Harlow to dismiss, or in the alternative for summary judgment. (N) Gesell, J.
173	Mar 2	NOTICE of defts. of submission of transcripts; affidavit of James B. Rhoads; attachment. (Sealed and taken to Marge Whitacre, Courtroom Division.)
174	Mar 5	NOTICE of defts, of submission of post-argument memorandum linking elements of pltf.-appellant Fitzgerald's tort theories to knowledge acquired within period of the statute of limitations; attachment.
175	Mar 5	MOTIONS argued and taken under advisement. (Rep: J. Moore) Gesell, J.
176	Mar 7	CONSENT ORDER filed 3-5-79 removing seal from certain tape transcripts and memoranda filed on July 5 and July 21,

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		1978 and on March 2, 1979; vacating Court's order of 6-16-78 placing certain documents under seal. (N) Gesell, J.
177	Mar 9	REPLY of Defts. to pltfs. March 6, 1979 letter regarding the applicability of the doctrine of fraudulent concealment to deft. #1.
178	Mar 19	MOTION of deft. #3 for enlargement of time to file a memorandum; supplemental memorandum. Appearance of Jeffrey Axelrad and Larry Gregg.
179	Mar 20	RESPONSE of pltf. to deft. Nixon's motion for enlargement of time.
180	Mar 26	ORDER granting motion of defts. for an extension of time; extending time through 3-27-79 within which to file a memorandum on the effect of the pardon of former President Nixon on this suit; pltf. to reply by 4-3-79. (N) Gesell, J.
181	Mar 26	SUPPLEMENTAL memorandum of pltf. in opposition to defts. motions to dismiss or, in the alternative, for summary judgment; table of contents table of authorities; attachments 1 and 2.
182	Mar 27	SUPPLEMENTAL memorandum of defts. regarding the effect of pardon, as requested by the Court, March 5, 1979.
183	Mar 30	SUPPLEMENTAL memorandum of pltf. regarding the affirmative defense of Presidential pardon.
184	Apr 2	MOTION of defts. for enlargement of time in which to file a reply to pltfs. supplemental memorandum.
185	Apr 5	ORDER filed 4-4-79 granting motion of defts. for an enlargement of time within which to reply to pltfs. supplemental memorandum in opposition to defts. motions to dismiss or in the alternative for summary judgment; extending time through 4-17-79. (N) (Signed 4-3-79) Gesell, J.

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186	Apr 6	REPLY of defts. to pltfs. supplemental memorandum regarding the affirmative defense of the presidential pardon.
187	Apr 11	ORDER filed 4-9-79 striking supplemental memorandum of defts. regarding the effect of the pardon filed 3-27-79; directing that former President Nixon has waived his defense(s) in this action based upon his pardon unless he asserts in writing within 10 days that the pay absolves him from liability for damages as alleged. (N) Gesell, J.
188	Apr 17	REPLY of defts. to pltfs. supplemental memorandum in opposition to deft motion to dismiss, or in the alternative, for summary judgment.
189	Apr 19	RESPONSE of pltf. to defts. reply to pltfs. supplemental memorandum in opposition to defts. motion to dismiss or, in the alternative, for summary judgment.
190	Apr 27	LETTER dated 3-6-79 with attachment to Court from Peter Raven-Hensen.
191	May 2	ORDER filed 4-27-79 denying in part and granting in part motions of defts. to dismiss or, in the alternative, for summary judgment; dismissing pltfs. claim under the 9th Amendment, his claim for unconstitutional and common law invasion of privacy, and his claims under 42 USC 1985(3) and 1986; withholding ruling as to whether pltf. stakes a cause of action under the fifth amendment. (N)Gesell, J.
192	May 9	TRANSCRIPT of proceedings of 3-5-79; Pages 1 through 94; (Rep: J. Moore); court copy.
193	May 11	STIPULATION whereby counsel agree that defts. Butterfield, Nixon and Harlow shall have through 5-22-79 within which to respond to the second amended complaint, SO ORDERED. (N) Gesell, J.

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194	May 15	MOTION by pltf. to take deposition by other than stenographic means; P&A
195	May 18	FIRST set of interrogatories to deft. #3 by pltf.
196	May 18	FIRST set of interrogatories by pltf. to deft. #4.
197	May 18	FIRST set of interrogatories by pltf. to deft. #1.
198	May 21	NOTICE of pltf. to take deposition of Harold Brown; attachments (2).
199	May 21	NOTICE of pltf. to take deposition of William Evan Timmons; attachments (3).
200	May 22	MOTION of defts. #1, 3, and 4 for enlargement of time to respond to the second amended complaint and for a stay of all proceedings; memo of P&A's.
201	May 22	MOTION of defts. #1, 3, and 4 for a stay of all proceedings pending this Court's determination on defts. motion for an enlargement of time to respond to the second amended complaint and for a stay of all proceedings.
202	May 23	OPPOSITION of defts. to pltfs. motion to take depositions by other than stenographic means.
203	May 24	WITHDRAWAL of appearance of Jeffrey Axelrad as counsel for deft. #3. CD/N. withdrawal of appearance of Mark A. Landman as atty. for same deft. and withdraw appearance of Jonathan B. Smith as counsel for all defts. (no longer with the Dept. of Justice).
204	May 24	SUPPLEMENTAL memorandum of defts. in support of opposition to pltfs. motion to take depositions by other than stenographic means.

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205	May 24	STATUS CALL. Motion of defts. for extension and stay to answer amended complaint denied. Pltfs. application to take depositions by other than stenographic means, denied. All Counsel to complete depositions by 9-1-79. (Rep: I. Watson) Gesell, J.
206	May 29	REPLY of pltf. to defts. opposition to pltfs. motion to take depositions by other than stenographic means; attachments A and B; affidavit of A. Ernest Fitzgerald.
207	May 30	ANSWER of deft. Nixon to second amended complaint. Appearance of Herbert J. Miller, R. Stan Mortenson, and Stephen L. Nightingale.
208	May 31	APPEARANCES of Herbert J. Miller, Jr., R. Stan Mortenson, & Stephen L. Nightingale as counsel for deft. Nixon, CD/N
209	June 1	ANSWER of deft. #1 to second amended complaint. Appearance of Jeffrey Axelrad and Mark S. Landman.
210	June 1	ANSWER of deft. #2 to second amended complaint.
211	June 4	NOTICE of deft. #3 to take deposition of pltf.
212	June 4	REQUEST of deft. #3 for production of documents by pltf.
213	June 4	FIRST set of interrogatories by deft. #3.
214	June 4	STIPULATION for defts. Butterfield and Harlow extending time through 6-1-79 within which defts. may respond to second amended complaint, approved. (N) Gesell, J.
215	June 5	STATUS CALL. Deposition of William Timmons to be taken by tape recorder as scheduled. Deposition of defts. to be taken by regular stenographic methods. (Rep: I. Watson) Gesell, J.
216	June 18	ANSWERS of deft. #4 to pltfs. first set of interrogatories.

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217	June 18	ANSWERS of deft. #1 to pltfs. first set of interrogatories.
218	June 20	NOTICE of pltf. to take deposition of David G. Wilson; attachments (2).
219	June 26	NOTICE of pltf. to take deposition of Jack L. Stempler; attachment.
220	June 26	NOTICE of pltf. to take deposition of Melvin R. Laird; attachment.
221	June 26	NOTICE of pltf. to take deposition of Dr. Henry A. Kissinger; attachment.
222	June 26	NOTICE of pltf. to take deposition of Robert C. Seamans, Jr.; attachment.
223	June 27	REVISED notice of pltf. to take deposition of Jack L. Stempler; attachment.
224	June 28	ANSWERS of deft. #3 to pltfs. first set of interrogatories; exhibit A.
225	July 3	MOTION of deft. #2 for entry of an order of judgment; memo of P&A's.
226	July 3	NOTICE of deft. Nixon to take deposition of Frederick Graboske; attachments (2).
227	July 5	NOTICE of pltf. to take deposition of William W. Woodruff; attachment.
228	July 9	ORDER filed 7-2-79 granting pltf. permission to take depositions by other than stenographic (tape recording) until such time as any party withdraws his consent to arrangement. (N) Gesell, J.
229	July 9	ORDER filed 7-5-79 directing that the Court's Order of 7-2-79 be amended by substituting the following language for that appearing in lines 9, 10 and 11 of the first paragraph: "on June 28, 1979, that the Timmons deposition ultimately resulted in a transcript acceptable to all parties after review by counsel for defts., discussions among all counsel, and revisions in the draft transcript, and that all counsel agree to have further depositions. . ." (N) Gesell, J.

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230	July 6	ANSWERS of pltf. to deft. #3's second set of interrogatories.
231	July 6	SECOND set of interrogatories of pltf. to deft. #1.
232	July 6	SECOND set of interrogatories of pltf. to deft. #4.
233	July 6	SECOND set of interrogatories of pltf. to deft. #3.
234	July 9	AMENDED notice of deft. #3 to take deposition of Frederick Graboske.
235	July 9	CANCELLATION of deposition notices to take depositions of Melvin R. Laird, Jack L. Stempler, Henry A. Kissinger and Robert C. Seamans, Jr. by pltf.
236	July 10	STIPULATION whereby counsel for pltf. and deft. Heldeman agree that the pltf. will have through 7-23-79 within which to respond to motion for entry of an Order of Judgment, approved. (N) Gesell, J.
237	July 11	MOTION to pltf. to disqualify the Dept. of Justice from representing deponents and parties herein; memo of P&A's; attachment.
238	July 18	Deposition of William E. Timmons taken on 6-15-79 for pltf.; notice of filing; original tape cassettes (3). (sealed and placed in vault in Room 1800). (Error) Exhibits 1-20.
239	July 20	MEMORANDUM of P&A's of defts. in opposition to pltfs. motion to disqualify the Dept. of Justice from representing deponents and parties herein; exhibits A-C.
240	July 23	MEMORANDUM of P&A's of pltf. in opposition to deft. #2's motion for entry of an order of judgment.
241	July 24	NOTICE of pltf. to take deposition of Jeb Stuart Magruder; attachment.

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242	July 24	NOTICE of defts. #1 and 4 for submission of affidavit of Thomas W. Nelson; exhibits 1-4.
243	July 24	WITHDRAWAL of appearance of Sharon M. Williams and appearance of John C. Keeney, Jr. as counsel for pltf. CD/N
244	July 24	RENEWED motion of pltf. to compel production of document from GSA; memo of P&A's; attachments A and B.
245	July 26	TRANSCRIPT of proceedings of 6-5-79, pages 1-18. (Rep: I. Watson); Court copy.
246	July 26	SUPPLEMENTAL answer to pltf. to deft. #3's second set of interrogatories.
247	July 27	REPLY of defts. to pltfs. opposition to deft. #2's motion for entry of an order of judgment.
248	July 27	TRANSCRIPT of proceedings of 5-24-79, pages 1-26. (Rep: I. Watson); Court copy.
249	July 31	AMENDED notice of deft. #3 to take deposition of pltf.
250	Aug. 2	ORDER filed 7-31-79 denying motion of pltf. to disqualify the Department of Justice from representing deponents and parties. (N) Gesell, J.
251	Aug.3	OBJECTION of deft #1 to pltfs. second set of interrogatories.
252	Aug. 3	OBJECTION of deft. #3 to pltfs. second set of interrogatories.
253	Aug. 3	OBJECTION of deft. #4 to pltfs. second set of interrogatories.
254	Aug. 9	STIPULATION AND ORDER filed 8-8-79 extending time to 8-13-79 for defts. to respond to renewed motion to compel. (N) Penn, J.

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255	Aug. 13	MEMORANDUM of P&A's by deft in opposition to pltf's. renewed motion to compel production of document from General Services Administration; attachment; attachments I & II.
256	Aug. 16	NOTICE by deft #2 to take deposition of Clark Mollenhoff; attachment.
257	Aug. 24	NOTICE of pltf. to take oral deposition of General Services Administration; attachment.
258	Aug. 27	REQUEST (first) of pltf. for admissions; exhibits 1-82.
259	Aug. 28	REQUEST of deft. that this Court exercise its discretion to strike immaterial and impertinent allegations from pltf's. second amended complaint; P&A's; attachments A and B.
260	Aug. 28	NOTICE of deft. to take the oral deposition of Richard F. Kaufman; attachment.
261	Aug. 28	NOTICE of deft. to take the oral deposition of Robert Riggs; attachment.
262	Aug. 28	NOTICE of deft. to take the oral deposition of Ronald L. Tammen; attachment.
263	Aug. 28	NOTICE of deft. to take the oral deposition of Peter Stockton; attachment.
264	Aug. 28	NOTICE by pltf. to take oral deposition of Robert C. Seamans, Jr.; attachment.
265	Aug. 28	NOTICE by pltf. to take oral deposition of Joseph Adams; attachment.
266	Aug. 28	NOTICE by pltf. to take oral deposition of Richard M. Nixon.
267	Aug. 28	NOTICE by pltf. to take oral deposition of Bryce N. Harlow.
268	Aug. 30	NOTICE by pltff. to take deposition of Nancy Brady; attachment.
269	Aug. 30	NOTICE by pltff. to take deposition of Harriet Zimmerly; attachment.

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270	Aug 31	REVISED notice by pltf. to take deposition of Joseph Adams; attachment.
271	Aug 31	MOTION of pltf. to terminate discovery and to set dates for final motions, pretrial, and trial; memo of P&A's.
272	Aug 31	NOTICE by pltf. to take deposition of H.R. Haldeman; attachment.
273	Sept 4	RESPONSE by deft. #3 to pltfs. motion to terminate discovery and to set dates for final motions, pretrial and trial.
274	Sept 5	REPLY memorandum by pltf. in support of his renewed motion to ? production of document from GSA; attachments A and B.
275	Sept. 5	MEMORANDUM of P&A's by defts. #1 and 4 in opposition to pltfs. motion to terminate discovery and to set dates for final motions pretrial, and trial; attachment 1.
276	Sept. 5	REVISED notice to take deposition of Jeb Stuart Magruder by pltf.; attachment.
277	Sept. 5	NOTICE by deft. #3 to take deposition of David S. Julyan; attachment
278	Sept. 5	RESPONSE by pltf. to deft. #1's request that this Court exercise its discretion to strick immaterial and impertinent allegations from pltfs. second amended complaint; attachment.
279	Sept. 7	NOTICE by pltf. to take deposition of the U.S. Dept. of the Air Force; attachments (2).
280	Sept 7	STATUS CALL. Pltf. to submit particularization statement by 10-19-79; defts. to submit particularization statement by 10-30- further status call set for 11-7-79 at 4:00 p.m.; trial set for 6-2-80 at 9:30 a.m. Motion of defts. to enter an order of judgment as to Haldeman granted; granting motion of pltf. for release of certain document (Dean), granted. (Rep: I. Watson) Gesell, J.

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281	Sept 12	NOTICE by deft. regarding oral depositions.
282	Sept 13	ORDER filed 9-7-79 granting motion of defts. for entry of an Order of Judgment as to deft. Haldeman; directing that entry of judgment be made FORTHWITH dismissing the action as to said deft. (N) Gesell, J.
283	Sept. 13	ORDER filed 9-7-79 granting motion of pltf. to compel the relase of document A-6/49 for discovery purposes. (N) Gesell, J.
284	Sept 13	ORDER filed 9-7-79 denying motion of pltf. to terminate discovery and to set dates for final motions, pretrial and trial discovery will terminate 10-7-79, pltf. to file a particularized statement of his theory of the case by 10-19-79, not to exceed 20 pages; defts, to file particularized statement(s) of their theories of defense by 10-13-79, not to exceed 10 pages; setting a status conference on 11-7-79 at 4:00 p.m.; setting trial for 6-2-80. (N) Gesell, J.
285	Sept. 13	NOTICE by deft, #3 that the depositions of Peter Stockton, Richard F. Kaufman, Ronald L. Tammen and Julian Julyan previously noticed for Sept. 10, 12, 13 and 14, 1979 have been postponed and that the deposition of Robert Riggs noted for 9-11-79 has been cancelled.
286	Sept. 14	REVISED notice by pltf. to take deposition of Jeb Stuart Magruder; attachment.
287	Sept. 17	MOTION by Jeb Stuart Magruder for a protective order continuing his deposition until 10-8-78; memo of P&A's.
288	Sept. 18	JUDGMENT filed 9-17-79 for deft. H.R. Halderman against pltf. A. Ernest Fitzgerald and dismissing the complaint as to said deft. (N) Gesell, J.

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289	Sept. 18	NOTICE by pltf. to take deposition of John Dean; attachment.
290	Sept. 20	REVISED notice by pltf. to take deposition of deft. Bryce N. Harlow.
291	Sept. 20	SECOND revised notice by pltf. to take deposition of Jeb Stuart Magruder; attachment.
292	Sept. 21	SUBMISSION by deft. Nixon with respect to the release of White House documents and asserted claims of privilege with respect thereto.
293	Sept. 21	UNREDACTED set of documents L1, S1, S2, S3, S4, S6, S7, A1, L1*, L2, L3, L4, L5, L6, and L7 filed and sealed by direction of the Court. (placed in vault).
294	Sept. 21	COPY of redacted documents produced to pltf. Fitzgerald on Sept. 11, 1979 filed and sealed by direction of the Court. (placed in vault)
295	Sept. 25	ORDER filed 9-21-79 granting motion of Jeb Stuart Magruder continuing his deposition; continuing said deposition until 10-8-79 at the offices of Hogan & Hartson; modifying Court's order of 9-7-79 rediscovery schedule to the extent consistent with this Order; discovery will terminate at the conclusion of Magruder's deposition. (N) Gesell, J.
296	Sept. 25	ORDER filed 9-21-79 upholding deft. Nixon's objections to production of certain documents; directing that production to pltf. will be limited to the redacted set of documents that deft. Nixon has previously transmitted to pltf. (N) Gesell, J.
297	Sept. 25	ORDER filed 9-21-79 denying request of deft. Nixon that the Court exercise its discretion to strike certain allegations from the second amended complaint. (N) Gesell, J.

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298	Sept. 24	RESPONSE by defts. #1 and 4 to pltfs. first request for admissions.
299	Sept. 25	ANSWERS and objections by deft. Nixon to pltfs. first request for admissions.
300	Sept. 27	MOTION of pltf. for an order establishing a final production date for documents in the custody of any party; memo of P&A's; attachments 1-5.
301	Oct. 5	NOTICE of appeal by pltf. from Order of 9-7-79, $5.00 paid and credited to U.S. Copies mailed to Mark S. Landman and R. Stan Mortenson.
302	Oct. 9	COPIES of notice of appeal and docket sheets transmitted to USCA. USCA #79-2201.
303	Oct. 11	$65.00 USCA docketing fee paid and credited to U.S.
304	Oct. 15	DEPOSITION of David G. Wilson taken 7-12-79; exhibits 21-26.
305	Oct. 15	NOTICE by pltf. that the signed transcript of the deposition of David G. Wilson with exhibits and original tape cassettes (2) have been filed with the Court on this date.
306	Oct. 15	ORIGINAL tape cassettes (2) by pltf.
307	Oct. 19	OPPOSITION of deft. #3 to pltfs. motion for an order establishing a final production date for documents in the custody of any party.
308	Oct. 19	MORE particularized statement of claim by pltf.; Appendix; attachments A-D.
309	Oct. 22	MOTION by pltf. for an order that certain of pltfs. requested admissions be deemed admitted by deft. Nixon; memo of P&A's; attachment.
310	Oct 22	ERRATA by pltf. to page 3 of pltfs. more particularized statement claim filed 10-19-79; page 3 attached.

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311	Oct. 23	NOTICE by defts. of submission of affidavit; affidavit of H.R. Haldeman.
312	Oct. 30	ORDER filed 10-25-79 denying motion of pltf. for an order establishing a final production date for documents without prejudice. (N) Gesell, J.
313	Oct. 29	RESPONSE by deft. Nixon to pltfs. motion that certain of pltfs. requested admissions be deemed admitted.
314	Oct. 30	NOTICE by pltf. of filing of deposition; transcript of deposition; exhibits 27, 28-A & B, 29-A & B, 30, 31(A), 32, 33, 34, 35, 36(A) 36(B), 38 (A) & (B), 39-41(A), 41(B) & 42; taped deposition of William W. Woodruff (4).
315	Oct. 31	PARTICULARIZED STATEMENT by defts. of their theories of defense to pltf's. causes of action; appendix; exhibit 47; attachments 1 thru 9.
316	Nov. 6	REPLY by pltf. to deft. #3's response to pltfs. motion that certain of pltfs. requested admissions be deemed admitted.
317	Nov. 8	NOTICE OF SUBMISSION OF AFFIDAVIT; Affidavit of Lloyd H. Cornett, Jr.; Exh. A.
318	Nov. 8	STATUS REPORT of pltfs.; Attachments A-D.
319	Nov. 8	TRANSCRIPT OF PROCEEDINGS of 9/7/79; courts copy pg. 1-70 reporter; Ida Z. Watson.
320	Nov. 8	DEPOSITION of A. Ernest Fitzgerald taken 8/14/79 for the deft.
321	Nov. 8	DEPOSITION OF A. Ernest Fitzgerald taken 8/16/79 for the deft.
322	Nov. 8	DEPOSITION of A. Ernest Fitzgerald taken 8/16/79 for the deft.
323	Nov. 8	DEPOSITION of Arthur Ernest Fitzgerald taken 8/17/79 for the deft.
324	Nov. 8	DEPOSITION of Arthur Ernest Fitzgerald taken 8/20/79 for the deft.

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325	Nov. 8	DEPOSITION of Arthur Ernest Fitzgerald taken 8/21/79 for the deft;
326	Nov. 8	DEPOSITION of A. Ernest Fitzgerald taken 8/27/79 for the deft.
327	Nov. 8	DEPOSITION of A. Ernest Fitzgerald taken 8/28/79 for the deft; exhibits.
328	Nov. 15	STATUS report by deft. Nixon.
329	Nov. 15	RECORD on appeal delivered to USCA; receipt ackn.
330	Nov. 15	DEPOSITION of Clark R. Mollenhoff taken on 8-23-79.
331	Nov. 15	DEPOSITION of Clark R. Mollenhoff taken on 8-23- and 8-24-79 (Exhibits 38-72 of Nixon; 73 and 73-B thru 73E of Harlow and Butterfield); pltfs. exhibits 43-46).
332	Nov. 15	DEPOSITION of CLARK R. MOLLENHOFF taken on 8-24-79.
333	Nov. 16	DEPOSITION of Robert C. Seamans, Jr. taken on 9-18-79 for pltf., Vol. I.
334	Nov. 16	DEPOSITION of Robert C. Seamans, Jr. (continued) taken on 9-19-79 for pltf., Vol. II.
335	Nov. 16	DEPOSITION of Robert C. Seamans, Jr. (continued) taken on 9-21-79 for pltf., Vol, III.
336	Nov. 16	AGREEMENT of voluntary dismissal of appeal with each party paying its respective costs.
337	Nov. 19	SECOND set of interrogatories by defts. #1 and 4 to pltf.
338	Nov. 23	ORDER FILED 11-19-79, denying pltf's motion for an order that certain of pltf's requested admissions be deemed admitted by deft. Nixon directing deft. Nixon, to furnish pltf. by 12-10-79 those documents or portions thereof of the 106 pages of documents located by the Archivist in response to pltf's August sub-

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		poena duces tecum or file such documents of portions thereof with the Court, *in Camera,* accompanied by a submission setting forth his objections to production to the extent practicable, which shall be served to the pltf.; defts' witness list shall be updated by 12-10-79; deft Nixon, shall produce by 12-10-79 all entries in the presidential daily logs for November and December, 1969, and January, 1970, reflecting communications with Bryce Harlow, Melbin Laird, Robert C. Seamans, Jr,. or David Packlard; parties to exchange lists of all persons each desires to depose by 1-7-80; deft., Nixon, shall notify Archives by 1-7-80 of any documents which he seeks relevant to this action; defts. shall notice and complete all discovery going to issues of liability in this case, including Magruder deposition by 2-8-80; any summary judgment motions or other pretrial motions directed to any aspect of this case; responses to pretrial motions shall be filed by 2029080; replies to responses by 3-8-80; oral argument of all pending motions set for 3-21-80 at 2:00 P.M. first Pretrial Conference set for 5-2-80 at 9:30 A.M. at which time parties shall submit a final witness list and copies of all documents which they intend to introduce at trial; second pretrial set for 5-12-80 at 9:30 A.M. at which time parties to submit proposed jury instructions proposed voir dire questions, and all evidentary objections previously exchanged; final pretrial conference set for 5-22-80 at 9:30 A.M.; Trial begin 6-2-80 at 9:30 A.M. (N) Gesell J.
339	Nov. 26	NOTICE by pltf. that the signed transcript of the deposition of Joan L. Howard with exhibits has been filed with the Court.

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340	Nov. 26	DEPOSITION of Joan Lee Howard taken on 9-12-79.
341	Nov. 26	ORIGINAL tape cassette (1) of deposition of Joan Lee Howard.
342	Nov. 26	EXHIBITS 49, 50, 51, 52, 53, 54, 55, and 56 by pltf.
343	Nov. 27	HEARING on motion. (OTBP) Rep: T. Eckstone) Gesell, J.
344	Nov. 28	NOTICE by pltf. of filing of depcsition.
345	Nov. 28	DEPOSITION of Harriet Zimmerly taken 9-6-79.
346	Nov. 28	ORIGINAL tape cassettes (2) of deposition of Harriet Zimmerly.
347	Nov. 28	EXHIBITS 24, 45, 46, 47 to deposition of Harriet Zimmerly.
348	Nov. 30	SECOND request by pltf. for production of documents to deft. #4.
349	Nov. 30	SECOND request by pltf. for production of documents to deft. #3.
350	Nov. 30	SECOND request by pltf. for production of documents to deft. #1.
351	Dec. 3	NOTICE by pltf. of filing of deposition exhibits of Robert C. Seamans, Jr.
352	Dec. 3	EXHIBITS 63, 64, 71, 72, 73, 74, 75. 76, 77, 78, 79, 80, 81, 82, 83, 84, 85. 86, 87, 88, 89, 90, 91, 92, 93, 94, 95. 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140-145 to deposition of Robert C. Seamans, Jr. (in manila envelope).
353	Dec. 4	MOTION by pltf. for an order directing Jeb Stuart Magruder to appear for the continuation of his deposition; memo of P&A's.

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354	Dec. 5	ORIGINAL record (11 vols., 12 vols.) under 3 covers, 20 depositions, 4 manila envelope of exhibits, 1 small expandable folder 2 tapes, 1 manila envelope with 4 tapes, 2 brown expandable folders of exhibits, 1 appendix with 3 rubberbands returned from USCA; receipt ackn.
355	Dec. 6	NOTICE by pltf. of filing deposition exhibits. (in manila folder)
356	Dec. 6	EXHIBITS 65, 66 and 70 to deposition of Robert C. Seamans, Jr.
357	Dec. 7	NOTICE by pltf. of filing of deposition.
358	Dec. 7	DEPOSITION of Joseph John Adams taken 9-12-79; exhibits 57-62.
359	Dec. 7	ORIGINAL tape cassettes (2) of deposition of Joseph John Adams (in manila envelope).
360	Dec. 10	NOTICE by deft. Nixon to take deposition of Melvin R. Laird; attachment.
361	Dec. 10	NOTICE by deft. Nixon to take deposition of Harold Brown; attachment.
362	Dec. 10	NOTICE by deft. Nixon to take deposition of Henry A. Kissinger; attachment.
363	Dec. 10	SUBMISSION by deft. Nixon regarding identification of trial witnesses.
364	Dec. 10	AMENDED answers by deft. Nixon and objections to certain paragraphs of pltfs. first request for admissions.
365	Dec. 10	NOTICE by pltf. of filing of deposition.
366	Dec. 10	DEPOSITION of Nancy Brady taken 9-6-79; exhibit 48.
367	Dec. 10	ORIGINAL tape cassettes (2) of deposition of Nancy Brady (in manila envelope).
368	Dec. 10	SUPPLEMENTAL answers by defts. #1 and 4 to pltfs. first set of interrogatories.

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369	Dec. 13	MOTION of pltf. for an order directing Jeb Stuart Magruder to appear for the continuation of his deposition heard and granted (Rep: I. Watson) Gesell, J.
370	Dec. 19	ORDER filed 12-17-79 that deposition of Jeb Stuart Magruder be continued on 12-21-79 at 10:00 a.m. in offices of Hogan & Hartson, 815 Conn. Ave., N.W., Wash., D.C.; directing that Jeb Stuart Magruder appear at the foregoing time and place (See order for further details.) (N) Flannery, J.
371	Dec. 19	THIRD set of interrogatories by pltf. to defts.
372	Dec. 20	NOTICE by deft. Nixon to take deposition of Ronald Ziegler; attachment.
373	Dec. 20	NOTICE by deft. Nixon to take deposition of PAtrick Buchanan; attachment.
374	Dec. 20	THIRD set of interrogatories by defts. #1 and 4 to pltf.
375	Dec. 21	SECOND request for admissions by pltf. to defts. Butterfield, Harlow and Nixon; attachment.
376	Dec. 21	NOTICE by pltf. to take deposition of U.S. Dept. of Defense; attachments (2).
377	Dec. 21	AMENDED notice by pltf. to take deposition of Melvin R. Laird.
378	Dec. 26	DEPOSITION of Richard Nixon taken 10-2 and 10-3-79 for pltf.; exhibits.
379	Dec. 27	FIRST request by defts. #1 and 4 for admissions by pltf.
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380	Jan. 2	RESPONSE by deft. Nixon to pltfs. second request for production of documents.
381	Jan. 3	NOTICE by pltf. to take deposition of Jeb Stuart Magruder.
382	Jan. 4	SUBMISSION by pltf. regarding identification of trial witnesses.

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383	Jan. 7	THIRD set of interrogatories by deft. Nixon to pltf.
384	Jan. 7	THIRD request by pltf. to defts. Butterfield, Harlow and Nixon for admissions; exhibits 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111 and 112.
385	Jan. 7	RESPONSE by deft. Butterfield to pltfs. second request for documents
386	Jan. 7	RESPONSE by deft. Harlow to pltfs. second request for documents.
387	Jan. 7	FOURTH set of interrogatories by pltf. to defts.
388	Jan. 7	LIST of individuals by defts. Butterfield and Harlow they presently intend to depose.
389	Jan. 7	SUBMISSION by pltf. of deponent list.
390	Jan. 7	SECOND request by defts. Butterfield and Harlow for production of documents to pltf.
391	Jan. 7	TRANSCRIPT of proceedings of 11-16-79, pages 1-75. (Rep: T. Eckstone); Court copy.
392	Jan. 7	DEPOSITION of Byrce N. Harlow taken 10-5 and 10-6, 1979; correction sheet.
393	Jan 8	ORDER filed 1-4-80 sustaining deft. Nixon's objection to further disclosure of any of "49 papers"; directing the Clerk of Court to file under seal deft. Nixon's submission entitled "Unredacted Set of Documents". (N) Gesell, J.
394	Jan 4	UNREDACTED/documents filed and sealed and placed in vault.
395	Jan 4	SUBMISSION by deft. Nixon with respect to release of White House documents.
396	Jan 8	SUBMISSION by deft. Nixon concerning deponents.

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397	Jan 10	NOTICE by pltf. to take oral deposition; attachment.
398	Jan 10	NOTICE by pltf. to take oral deposition; attachments (2).
399	Jan 10	NOTICE by defts. to take deposition.
400	Jan 15	AMENDED notices by deft. Nixon, of oral deposition.
401	Jan 15	NOTICE by defts. #1 and 4 to take deposition of Dwight Chapin.
402	Jan 15	NOTICE by defts. #1 and 4 to take deposition of Robert P. Mayo.
403	Jan 17	NOTICE by defts. 1 and 4 to take deposition of Colonel John Badin, Jr.
404	Jan 17	NOTICE by defts. #1 and 4 to take deposition of Larry Higby.
405	Jan 17	AMENDED notice by defts. #1 and 4 to take deposition of Robert P. Mayo.
406	Jan 17	NOTICE by deft. Nixon to take deposition of John D. Ehrlichman.
407	Jan 17	ERRATA from the list of deponents served by Mr. Nixon on 1-7-80 Charles Peters, Ralph Nader and Stewart Mott.
408	Jan 18	SUBMISSION by deftfs. #1 and 4 regarding identification of potential trial witnesses.
409	Jan 18	NOTICE by defts. #1 and 4 to take deposition of James R. Schlesinger.
410	Jan 21	IDENTIFICATION of trial witnesses by pltf.
411	Jan 21	RESPONSE by defts. #1 and 4 to pltfs. second request for admission.
412	Jan 22	SECOND submission by deft. Nixon regarding identification of trial witnesses.
413	Jan 23	RESPONSE by deft, Nixon to pltfs. second request for admissions.
414	Jan 23	DEPOSITION of Patrick J. Buchanan taken 1-15-80 for deft. Nixon; exhibits.

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415	Jan 25	NOTICE by pltf. to take deposition of GSA; attachment.
416	Jan 25	NOTICE by pltf. to take deposition of Office of Management and Budget; attachment.
417	Jan 25	NOTICE by pltf. to take deposition of U.S. Dept. of Energy; attachment.
418	Jan 25	DEPOSITION of Harry R. Haldeman taken 9-27-79 for pltf.; exhibits.
419	Jan 28	NOTICE by pltf. of cancelling deposition of Jeb Stuart Magruder.
420	Jan 28	AMENDED notice by pltf. to take deposition of Robert E. Pursley.
421	Jan 28	NOTICE by defts. to take deposition of Egil Krogh.
422	Jan 28	NOTICE by defts. #1 and 4 to take deposition of Richard Nixon.
423	Jan 28	NOTICE by defts. #1 and 4 to take deposition of H.R. Haldeman.
424	Jan 29	ANSWER by pltf. to first request for admissions by defts. #1 and 4.
425	Jan 29	CANCELLATION by pltf. of deposition notice to take deposition of William J. Baroody, Jr.
426	Jan 29	REVISED notice by defts. #1 and 4 to take deposition of Robert P. Mayo.
427	Jan 29	STIPULATION that any party may take the deposition of Colonel John Badin, Jr. on liability and/or damages at any time prior to 5-2-80, so ordered. (N) Gesell, J.
428	Feb 1	AMENDED notice by deft. Nixon of deposition of Melvin R. Laird.
429	Feb 4	NOTICE by pltf. to take deposition of David G Wilson; attachment.
430	Feb 4	ANSWERS by pltf. to deft. Nixon's third set of interrogatories.
431	Feb 4	MOTION by defts. #1 and 4 for enlargement of time for all parties to file summary judgment motions or other pretrial motions.

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432	Feb. 4	DEPOSITION of James R. Schlesinger taken 1-18-80 for defts.
433	Feb. 5	MOTION by the Secretary of Defense, Harold Brown, for protective order; memorandum
434	Feb. 6	SUBMISSION by defts. #1 and 4 regarding identification of expert witnesses.
435	Feb. 6	RESPONSE by defts. #1 and 4 to pltfs. third request for admissions.
436	Feb. 7	RESPONSE by deft. #3 to pltfs. third request for admissions.
437	Feb. 7	SUBMISSION by deft. #3 regarding experts.
438	Feb. 7	RESPONSE by deft. #3 to motion for protective order.
439	Feb. 7	RESPONSE by pltf. to defts. #1 and 4's second request for production of documents.
440	Feb. 8	MOTION by pltf. for an order compelling production of documents by deft. Nixon; memo of P&A's; attachment 1; exhibits A,B, and C.
441	Feb. 8	MOTION by pltf. for order compelling defts. answer to pltfs. second set of interrogatories; memo of P&A's; exhibits A-G.
442	Feb. 8	DEPOSITION of Ronald A. Ziegler taken 1-14-80 for deft. Nixon; exhibit 222.
443	Feb. 11	ORDER files 2-8-90 granting motion of defts. for enlargement of time within which to file summary judgment motions or other pretrial matters; extending time through 2-11-80.
444	Feb. 11	DEPOSITION of John Ehrlichman taken 2-4-80; index of exhibits; exhibits (attached to deposition).

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445	Feb. 11	SUBMISSION by Richard Nixon concerning his pretrial motions and the state of the record in this case; consolidated statement of material facts; attachment (in black binder with tabs).
446	Feb. 11	MOTION by deft. Nixon for summary judgment based upon the statute of limitations; table of contents and authorities; memo of P&A's
447	Feb. 11	MOTION by deft. Nixon for summary judgment on grounds of immunity and the absence of wrongful conduct; table of contents and authorities; memorandum.
448	Feb. 11	MOTION by deft. Nixon to dismiss for failure to state a claim under the Fifth Amendment or, alternatively, for partial summary judgment; table of contents and authorities; memo of P&A's.
449	Feb 11	MOTION by deft. Nixon for partial summary judgment as to pltfs. allegations concerning the OSI inquiry, punitive damages, intentional infliction of mental distress, and interference with advantageous economic relationships; table of contents and authorities; memorandum of P&A's.
450	Feb 11	MOTION by defts. #1 and 4 for leave to file brief in excess of page limitations of Local Rule 1-9(e); of P&A's.
451	Feb 12	ORDER granting defts. Butterfield and Harlow leave to file brief in excess of page limitations and memorandum of points and authorities thereof in support of motion for summary judgment. (N) Gesell, J.
452	Feb 12	MOTION by defts. #1 and 4 for summary judgment; exhibits; memorandum of P&A's; attachments 1, 2, and 3; statement of material facts.

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453	Feb 12	ORDER granting motion of defts. Butterfield and Harlow for leave to file their memorandum of P&A's in excess of thirty-five pages in support of motion for summary judgment. (N) Gesell, J.
454	Feb 13	RESPONSE by pltf. to Secretary Brown's motion for protective order.
455	Feb 15	DEPOSITION of Melvin Laird taken 2-1-80; exhibit list; exhibits.
456	Feb 19	ORDER granting motion of Harold Brown, Secretary of Defense, for a protective order subject to certain conditions. (See order for further details.) (N) Gesell, J.
457	Feb 20	DEPOSITION of Henry A. Kissinger taken 1-25-80 for deft. Nixon; exhibits.
458	Feb 21	MOTION by pltf. for enlargement of page limitations; memo of P&A's.
459	Feb 21	JOINT motion for extension of briefing dates; memo of P&A's.
460	Feb 21	DEPOSITION of Robert P. Mayo taken 1-31-80; exhibits attached.
461	Feb 22	NOTICE by pltf. of filing of deposition; attachment; exhibits 215 thru 221; taped depositions (2) of Jeb Stuart Magruder.
462	Feb 25	NOTICE by defts. to take oral deposition of Roy Anderson.
463	Feb 25	ORDER granting joint motion for extension of briefing dates; and extending time for filing responses to pretrial motions from 2-29-80 to 3-3-80 and extending time for filing replies to such responses from 3-8-80 to 3-11-80. (N) Gesell, J.
464	Feb 25	ORDER granting motion of pltf. for enlargement of page limitations and authorizing pltf. to file a single, consolidated memorandum of points and authorities, not to exceed 157 pages in length. (N) Gesell, J.

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465	Feb 29	OPPOSITION by defts. #1 and 4 to motion for order compelling defts. answers to pltfs. second set of interrogatories.
466	Mar 4	MEMORANDUM of P&A's by deft. Nixon in opposition to pltfs. motion for an order compelling production of documents.
467	Mar 4	MEMORANDUM of P&A's by deft. Nixon in opposition to pltfs, motion to compel answers to pltfs, second set of interrogatiories.
468	Mar 4	DEPOSITION of Egil Krogh taken on 2-7-80; exhibits 175-180 (in manila envelope attached to deposition).
469	Mar 4	DEPOSITION of H. R. Haldeman taken on 2-7-80; exhibits 262 and 181 (in manila envelope attached to deposition).
470	Mar 4	DEPOSITION of Alexander M. Haig taken on 1-27-80 for defts.; exhibits.
471	Mar 4	SUBMISSION by pltf. regarding his opposition to defts. summary judgment motions; statement of genuine issues; opposition by pltf. to deft. Nixon's and deft. Harlow's second and deft. Butterfield's third motions for summary judgment; exhibits and attachments list; opposition by pltf. to deft. Nixon's and deft. Harlow's second and deft. Butterfield's third motions for summary judgment; affidavit of A. Ernest Fitzgerald; exhibits. and attachments A-Q (in black binder). (Submissions and exhibits all in brown manila folder.)
472	Mar 7	DEPOSITION of Richard F. Kaufman taken on 2-1-80 for deft. Nixon.
473	Mar 7	EXHIBITS to deposition of Richard F. Kaufman (in yellow binder).
474	Mar 11	REPLY by pltf. to deft. Nixon's opposition to motion for an order compelling production of documents.

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475	Mar 11	MOTION by deft. Nixon for extension of time within which to file a reply to Fitzgerald's opposition to deft. Nixon's motion for summary judgment; memo of P&A's.
476	Mar 11	REPLY by deft. Nixon to pltfs. opposition with regard to the OSI inquiry, punitive damages, intentional infliction of mental distress, and interference with advantageous economic relationships.
477	Mar 11	REPLY by deft. Nixon to pltfs. opposition to motion for failure to state a claim under the Fifth Amendment or, alternatively, for partial summary judgment.
478	Mar 11	REPLY by deft. Nixon to pltfs. opposition to motion for summary judgment based on the statute of limitations; attachment 1.
479	Mar 11	REPLY by pltf. to defts. oppositions to motion for order compelling defts. answers to pltfs. second set of interrogatories.
480	Mar 11	REPLY by deft. Butterfield to plts. opposition to deft. Nixon and deft. Harlow's second and deft. Butterfield's third motions for summary judgment; attachment 1.
481	Mar 11	REPLY by deft. Harlow to pltfs. opposition to deft. Nixon and deft. Harlow's second and deft. Butterfield's third motion for summary judgment; exhibits A,B,C, DX45 and DX 62.
482	Mar 12	REPLY by deft. Nixon to pltfs. opposition with regard to immunity and absence of wrongful conduct; attachment.
483	Mar 13	ORDER granting motion for extension of time; extending time through 3-12-80 within which replies to pltfs. opposition to the pending motions for summary judgment may be filed. (N) Gesell, J.

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484	Mar 18	SUBMISSION by deft. Nixon of deposition citations.
485	Mar 18	SUBMISSION by deft. Nixon of a chart concerning the undisputed issues in this case; attachment.
486	Mar 20	SUBMISSION of corrections by pltf. to deft. Nixon's chart concerning the undisputed facts in this case; attachment.
487	Mar 20	SUPPLEMENTATION of record by pltf. in response to defts. replies to pltfs. opposition to motions for summary judgment with respect to the statute of limitations; attachment A; attachment; attachment B.
488	Mar 21	MOTIONS heard and taken under advisement. (Rep: I. Watson) Gesell, J.
489	Mar 24	SUPPLEMENTAL answers by pltf. to interrogatory 84 of defts. first interrogatories and interrogary 15 of deft. Nixon's secons set of interrogatories; Appendices A, B, and C.
490	Mar 24	SUPPLEMENTAL answer by pltf. to interrogatory NO. 4 of deft. Nixon's third set of interrogatories.
491	Mar 24	DEPOSITION of Roy A. Anderson taken on 2-29-80.
492	Mar 24	ORDER granting in part and denying in part motion of pltf. for an order compelling production of documents; granted as to the memorandum for Fonald L. Ziegler from Jerry Warren dated 9-18-73 and memorandum from Len Garment to Mel Laird dated 9-14-73. (N) Gesell, J.
493	Mar 26	ORDER granting in part and denying in part motions of defts. for summary judgment; changing time of Pretrial #2 to 5-12-80 at 2:00 p.m. and rescheduling trial for 6-4-80 at 9:30 a.m. (See order for further details.) (N) Gesell, J.

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494	Mar 26	MEMORANDUM regarding statute of limitations denying motions of each deft. for summary judgment on grounds that suit is barred by the statute of limitations. (N) Gesell, J.
495	Apr 2	NOTICE by pltf. to take deposition of the National Broadcasting Co., Inc.; attachments (2).
496	Apr 8	DEPOSITION of Dwight L. Chapin taken 1-17-80; exhibits.
497	Apr 8	MOTION by deft. Nixon to shorten time for response to request for production of documents; memorandum; attachments A and B.
498	Apr 8	SECOND request by Richard Nixon, deft., for production of documents by pltf.
499	Apr 8	NOTICE by deft. Nixon to take deposition of John Bodner, Jr.; attachments (2).
500	Apr 9	SUPPLEMENTAL submission by defts. #1 and 4 regarding trial witnesses.
501	Apr 9	NOTICE by defts. #1 and 4 to take deposition of Dr. Gardner.
502	Apr 9	NOTICE by defts. #1 and 4 to take deposition of Lloyd M. Doehrmann.
503	Apr 9	NOTICE by defts. #1 and 4 to take deposition of Mrs. Neil B. Fitzgerald.
504	Apr 9	NOTICE by defts. #1 and 4 to take deposition of David H. Moran.
505	April 9	NOTICE by defts. #1 and 4 to take deposition of Frank Shrontz.
506	April 9	NOTICE by defts. #1 and 4 to take deposition of Joseph Aragon.
507	April 9	FURTHER identification of trial witnesses by pltf.
508	Apr 10	MOTION by defts. #1 and 4 for a new order regarding their motion for summary judgment; memo of P&A's.
509	Apr 11	NOTICE by defts. #1 and 4 to take deposition of Henry Durham.

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510	**Apr 11	AMENDED notice by defts. #1 and 4 to take deposition of David H. Moran.
511	*Apr 10	NOTICE of appeal by deft. #1 from order of 3-26-80. Govt. no fee. Copies mailed to Peter Raven-Hansen and R. Stan Mortenson.
512	*Apr 14	COPIES of notice of appeal and docket entries transmitted to USCA. USCA #80-1406.
513	Apr 11	NOTICE by deft. Nixon to take deposition of Charles G. Peters, Jr.; attachments (3).
514	April 11	MOTION by deft. Nixon to supplement order of 3-26-80; memo of P&A's.
515	Apr 11	MOTION by deft. Nixon to set date for deposition of Secretary Harold Brown; memo of P&A's.
516	Apr 11	NOTICE by deft. Nixon to take deposition of Rep. Andrew Jacobs; attachments (2).
517	**Apr 11	NOTICE by deft. Nixon to take deposition of William Sollee;
518	Apr 11	NOTICE of appeal by deft. Nixon from order of 3-26-80. Copies mailed to Peter Raven-Hansen and Mark S. Landman.
519	*Apr 14	COPIES of notice of appeal and docket entries transmitted to USCA. USCA #80-1407.
520	Apr 10	NOTICE of appeal by deft. #4 from order of March 26, 1980. Govt. no fee. Copies mailed to Peter Raven-Hansen and R. Stan Mortenson.
521	*Apr 14	COPIES of notice of appeal and docket entries transmitted to USCA. USCA #80-1408.
522	Apr. 15	RESPONSE of Secretary of Defense Harold Brown to deft. Nixon's motion to set date for deposition.

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523	Apr. 15	$70.00 paid for notice of appeal and docketing fee by deft. Nixon and credited to U.S.
524	Apr. 15	OFFER of judgment by deft. Nixon.
525	Apr. 15	SECOND supplemental submission by defts. #1 and 4 regarding trial witnesses.
526	Apr. 15	MOTION by deft. Nixon for continuance of pretrial and trial dates; memorandum.
527	Apr. 16	RETURN on service on William L. Woodruff, Hughes Aircraft Co. of subpoena and fees; attachments (2).
528	Apr. 16	RETURN on service on the National Broadcasting Co. of subpoena and fees; attachments (3).
529	Apr. 16	RETURN on service on Joan Lee Howard, National Archives and Records Service of subpoena and fees; attachments (2).
530	Apr. 16	SECOND submission by deft. Nixon regarding experts.
531	Apr. 17	OPPOSITION by pltf. to defts. motions to supplement this Court's order of 3-26-80.
532	Apr. 17	OPPOSITION by pltf. to deft. Nixon's motion for continuance of pretrial and trial dates; attachments A and B.
533	Apr. 18	ORDER filed 4-16-80 granting motion of deft. Nixon to set date for deposition of Secy. Harold Brown; directing that said deposition be taken on 4-19-80 at 11:00 a.m. in accordance with the procedure set out in Court's order of 2-15-80. (N) Gesell, J.
534	Apr. 21	AMENDED notices by deft. Nixon to take depositions of William Sollee, Ronald Tammen, and David Julyan.
535	Apr. 21	NOTICE by defts. #1 and 4 to take deposition of John R. Glennie.
536	Apr. 21	NOTICE by defts. #1 and 4 to take deposition of H. Patrick Swygert.

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537	Apr. 22	NOTICE by deft. Nixon to take deposition of Senator William Proxmire.
538	Apr. 22	AMENDED notice by deft. Nixon to take depositions of Ronald Tammen and David Julyan.
539	April 22	RETURN on service of subpoena for James R. Schlesinger; attachment.
540	April 22	RETURN on service of subpoena for Ronald L. Ziegler; attachment.
541	April 23	ORDER filed 4-18-80 denying motions of defts. to supplement the Court's order of 3-26-80. (N) Gesell, J.
542	April 23	ORDER filed 4-18-80 denying motion of deft. Nixon for continuance of pretrial and trial dates; extending time through 5-2-80 for final designation of witnesses for good cause shown. (N) Gesell, J.
543	April 24	NOTICE by deft. Nixon to take deposition of John Bodner; attachments (2).
544	April 24	RETURN on service of subpoena for Frederick J. Graboske; attachments (2).
545	April 24	REQUEST to USCA for an expedited hearing. (N) Gesell, J.
546	April 29	NOTICE by deft. Nixon to take deposition of pltf.
547	April 29	AMENDED notice to take deposition of H. Patrick Swygert.
548	April 30	FURTHER identification of trial witnesses (3) by pltf.
549	May 1	COPY of ORDER USCA filed 4-30-80 granting appellee's motions to dismiss and for expedited consideration of motion.
550	May 1	MOTION of defts. Butterfield & Harlow to extend discovery for the deposition of H. Patrick Swygert; attachment A & B.
551	May 2	LIST of trial witnesses by pltf.
552	May 2	TRIAL exhibits by pltf.

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553	May 2	PRETRIAL PROCEEDINGS. Motion of defts. to extend discovery for the deposition of Swygert, granted. (Rep: I. Watson) Gesell, J.
554	May 6	ORDER filed 5-2-80 granting motion of defts. Butterfield and Harlow to extend discovery for the deposition of H. Patrick Swygert and directing that said deposition may be taken on or before 5-9-80. (N) Gesell, J.
555	May 7	ORDER filed 5-5-80 denying motion of pltf. for order compelling defts. answers to second set of interrogatories. (N) Gesell, J.
556	May 7	TRANSCRIPT of proceedings of 3-21-80, pages 1-66. (Rep: I. Watson) Gesell, J.
557	May 7	MOTION by deft. #4 in liminine to exclude White House tape recorded conversations; memo of P&A's; attachment 1; exhibit 160.
558	May 7	MEMORANDUM by pltf. concerning the handling of White House tapes and transcripts at trial.
559	May 7	STATEMENT of issues by defts. #1 and 4 which should be resolved prior to trial.
560	May 9	PROPOSAL by pltf. concerning designation of depositions.
561	May 9	LIST of issues to be resolved through pretrial by pltf.; attachment.
562	May 9	OPPOSITION by pltf. to deft. #4's motion in limine; attachment.
563	May 9	MOTION by pltf. to exclude witnesses not listed in answers to his interrogatory requiring the identification of trial witnesses.
564	May 9	PRETRIAL memorandum by pltf. concerning exclusion of settlement exhibits and witnesses; attachment; attachments A-E.

Record Reference Number	Date	Proceedings
	1980	
565	May 12	RESPONSE by pltf. to defts. joint statement of issues which should be resolved prior to trial.
566	May 12	SUBMISSION by pltf. of objections to defts. trial exhibits; attachment.
567	May 12	REQUESTS by pltf. for jury instructions and request for preliminary instructions
568	May 12	SUBMISSION by defts. Alexander P. Butterfield and Bryce N. Harlow regarding identification of expert witnesses.
569	May 12	PRETRIAL: Deft. Harlow's objections to tapes denied; further pretrial 05-16-80 at 10:00 A.M. (Rep: Watson) Gesell, J.
570	May 14	CONSPIRACY contentions by pltf.
571	May 14	RETURN on service; attachments (2).
572	May 14	JOINT opposition by defts. to pltfs. request to exclude all witnesses with information concerning pltfs. recent attempts to gain other employment.
573	May 15	DEPOSITION of Dr. Ray Gardner taken 4-30-80; attachment.
574	May 15	REPLY by pltf. to defts joint opposition to his request to exclude settlement exhibits and witnesses; attachments (2).
575	May 16	DEPOSITION of Frank Shrontz taken 4-22-80.
576	May 16	JOINT response of defts. to pltfs. reply to defts. joint opposition to his request to exclude settlement exhibits and witnesses.
577	May 16	FIRST submission by deft. Nixon regarding pltfs. proposed jury instructions.
578	May 16	JOINT response by defts. to pltfs. proposed pretrial order No. 1.
579	May 16	SUBMISSION by deft. Nixon of proposed form of verdict; attachment.
580	May 16	STIPULATION re; appointment of L.J. Evans and employment of Richard L. Burtner.

Record Reference Number	Date	Proceedings
	1980	
581	May 16	PRETRIAL proceedings. (I. Watson) Gesell, J.
582	May 19	DESIGNATION of deposition testimony by pltf.
583	May 20	FIRST designation of deposition testimony by pltf.
584	May 20	MOTION by defts. for a stay; memo of P&A's.
585	May 20	DEPOSITION of Albert O. Cornelison, Jr. taken 4-16-80 for defts.
586	May 20	DEPOSITION of John Bodner, Jr. taken 4-16-80 for defts.
587	May 20	DEPOSITION of Andrew Jacobs, Jr. taken 4-25-80 for defts.
588	May 20	DEPOSITION of Charles Peters taken 4-25-80 for defts.
589	May 22	DEPOSITION of Lloyd Doehrmann taken 4-24-80 for defts. #1 and 4.
590	May 22	MOTION by defts to stay heard & granted. Pretrial cancelled & trial postponed indefinitely. (R. Weber, Reporter) Gesell, J.
591	May 28	ORDER filed 5-22-80 granting motion of all defts to stay; staying all proceedings; cancelling pretrial; continuing trial date indefinitely. (N) Gesell, J.
592	June 12	DEPOSITION of William Proxmire taken 5-1-80; exhibits.
593	June 12	DEPOSITION of onald L. Tammen taken 4-29-80; exhibits.
594	June 27	DEPOSITION of Henry Durham taken 4-29-80 for defts.; errata sheet.
595	Aug 7	COPY of ORDER filed 4-30-80 granting appellee's motion to dimiss the appeal.
596	Aug 27	DEPOSITION of David H. Moran taken 4-26-80 for defts.; Exhibit.

Record Reference Number	Date	Proceedings
	1980	
597	Aug 27	DEPOSITION of Nell B. Fitzgerald taken 4-28-80 for defts.
598	Aug 27	DEPOSITION fo David S. Julyan taken 4-29-80 for deft. #3; Exhibit.
599	Aug 27	DEPOSITION of John R. Glennie taken 5-2-80 for defts.; Exhibit.
600	Oct 30	CERTIFIED copy of ORDER USCA filed 4-30-80 granting appellee's motion to dismiss.
601	Dec 16	TRANSCRIPT of proceedings of 15-16-80, pages 1-172. (Rep: I. Watson) Court copy.
	1981	
602	Feb 17	DEPOSITION of Frederick J. Graboske taken 7-9-70 for defts.; errata.
603	Sept 16	RECORD on appeal (6 boxes) with sealed material (6 envelopes) delivered to U.S. Supreme Court.
604	Oct 9	DEPOSITION of Richard Nixon taken 2-7-80; exhibits; attachment.

IN THE
United States District Court
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-178

A. ERNEST FITZGERALD,
Plaintiff,

v.

ALEXANDER P. BUTTERFIELD,
H. ROBERT HALDEMAN,
RICHARD M. NIXON,
BRYCE N. HARLOW,
Defendants.

ORDER
[Filed April 27, 1979]

Upon consideration of the defendants' motions to dismiss or, in the alternative, for summary judgment, the opposition thereto, the entire record herein, and the oral arguments of counsel, it is hereby

ORDERED that the defendants' motions to dismiss or in the alternative for summary judgment are denied in the following respects:

A. *Causes of Action*

1. Plaintiff states a cause of action under the First Amendment to the United States Constitution based on defendants' alleged retaliation for plaintiff's having exercised his rights of free speech and petition. *Mount Healthy City School Dist. Bd. of Education* v. *Doyle*, 429 U.S. 274, 283-84 (1977); *Perry* v. *Sindermann*, 408 U.S. 593, 596-98 (1972). In addition, a damage remedy lies for such a violation. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Dellums* v. *Powell*, 566 F.2d 167, 194-96 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (U.S. July 3, 1978).

2. Plaintiff states a cause of action for damages under 5 U.S.C.A. § 7211 (1979 pocket part). *See Cort* v. *Ash*, 422 U.S. 66, 78 (1975). The plaintiff is part of the class for whose especial benefit the statute was enacted. *See* Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 555 (provision originally placed at end of section protecting civil servants from capricious removals); 48 Cong. Rec. 4493, 5625-27, 5633-36, 10671-75 (1912). There exists no indication of a legislative intent to deny a private remedy under the provision, and implication of such a remedy is not inconsistent with the underlying purposes of the legislative scheme and impinges on no area fundamentally the concern of the states.

3. Plaintiff states a cause of action for damages under 18 U.S.C. § 1505. That statute punishes anyone who "injures any . . . witness in his person or property . . . on account of his testifying or having testified" before a committee of the Congress. From this phraseology, it appears that plaintiff is a member of a class for whose especial benefit the statute was, at least in part, enacted. This conclusion is confirmed by the provision's legislative history. *See* S. Rep. No. 225, 79th Cong., 1st Sess. (1945); H.R. Rep. No. 1143, 76th Cong., 1st Sess. (1939); 84 Cong. Rec. 9312, 10910-12 (1939). The other factors listed in *Cort* v. *Ash, supra,* are satisfied. Of particular significance is the fact that 5 U.S.C.A. § 7211 (1979 pocket part) and 18 U.S.C. § 1505 may not in the context of this case overlap in all pertinent respects; yet implication of a private damage remedy under the first provision but not the second would not seem to make much logical sense. Furthermore, the Supreme Court has emphasized that, in appropriate circumstances, private damage remedies may be inferred from penal statutes. *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201-02 (1967).

4. Plaintiff states a cause of action under D.C. law for intentional interference with (existent and prospective) economic advantage. *Carr* v. *Brown*, No. 12922, slip op. at 8-10 (D.C. Ct. App. Nov. 24, 1978); *Dunn* v. *Cox*, 163 A.2d 609, 611 (D.C. Mun. App. 1960); *Alfred A. Altimont, Inc.* v. *Chatelain, Samperton & Nolan*, 374 A.2d 284 (D.C. Ct. App. 1977).

5. Plaintiff states a cause of action under D.C. law for intentional infliction of mental distress by extreme and outrageous conduct. *Clark* v. *Associated Retail Credit Men*, 105 F.2d 62, 64-65 (App. D.C. 1939); *Mosely* v. *Bank of Virginia*, No. 5573-77 (D.C. Super. Ct. June 19, 1978).

B. The service of process effected on defendants Nixon and Harlow was proper, Fed. R. Civ. P. 4(d)(7), (e) & (f); D.C. Code §§ 13-423(a) (3), 13-424, 13-431; *United States* v. *First National City Bank*, 379 U.S. 378, 381 (1965), and this court has personal jurisdiction over those two defendants as well, *see International Shoe Co.*. v. *Washington*, 326 U.S. 310, 316-19 (1945); *Briggs* v. *Goodwin*, 569 F. 2d 1, 8-10 (D.C. Cir. 1977); D.C. Code § 13-423(a) (3); 2 Moore, Federal Practice ¶4.25[7].

C. *Nixon*

1. By reason of the doctrine of "fraudulent concealment," this suit is not time-barred as against defendant Nixon. *Fitzgerald* v. *Seamans*, 553 F. 2d 220, 228-29 (D.C. Cir. 1977). It was not until June 1978 that plaintiff discovered facts so sufficiently implicating Nixon in the subject matter of this case as to meet the requirements of Fed. R. Civ. P. 11; with due diligence plaintiff could not have discovered these facts at any earlier date.

2. To establish either arguably applicable immunity defense, the President must show that he was acting "within the outer perimeters" of his responsibilities. *Butz* v. *Economou*, 46 U.S.L.W. 4952 (June 29, 1978); *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, 566 F. 2d 289 (D.C. Cir. 1977) (en banc), *cert. denied*, 46 U.S.L.W. 3803 (U.S. July 3, 1978). At this stage of the litigation, the Court cannot conclude that Nixon was acting within the outer perimeters of his duties when he performed the acts which the complaint alleges he performed.

a. There exist genuine issues of fact as to Nixon's conduct in connection with the subject matter of this suit.

b. By statute and regulation, the President had no authority to hire, discharge or interfere with the employment of an employee such as Fitzgerald. 5 U.S.C. § 7512 (1976); 10 U.S.C. § 8012(e); 5 C.F.R. § 6.3; *Fitzgerald* v. *Hampton*, 467 F.2d 755, 762 (D.C. Cir. 1972).

c. Other statutory provisions as well bar the President from doing what he is alleged to have done. 5 U.S.C.A. § 7211 (1979 pocket part); 18 U.S.C. § 1505.

Therefore, at this stage, the Court will not decide whether defendant Nixon may be protected by an absolute or qualified immunity defense.

3. The issues raised against defendant Nixon are justiciable under *Baker* v. *Carr*, 369 U.S. 186 (1962). Arguments flowing from the separation of powers or resting upon the risks inherent in permitting civil damage actions against past or present Presidents for acts performed while in office are more appropriately addressed when determining the kind of immunity from suit which the President should enjoy.

D. *Harlow*

1. Plaintiff's claims against defendant Harlow are not time-barred. Only sometime after October 1977 did plaintiff find out about Harlow's conversations with Seamans during the spring of 1969. Fitzgerald Affidavit of July 5, 1978, ¶6; Mollenhoff Affidavit of Aug. 1, 1978, ¶7. Plaintiff could not have with due diligence discovered this information prior to that date.

2. Genuine issues of fact remain as to the scope of Harlow's responsibilities, as to the nature of his actions in the Fitzgerald matter beginning in the spring of 1969, and as to whether such actions as he did take were performed in good faith. Accordingly, summary judgment cannot be granted at this time to defendant Harlow based on any claim of immunity, whether he be entitled to assert an absolute or qualified immunity.

E. *Butterfield*

1. Plaintiff's claims against defendant Butterfield are not time-barred. Discovery has not revealed any further information bearing on plaintiff's due diligence since the opinion of the Court of Appeals in *Fitzgerald v. Seamans, supra.*

2. Genuine issues of fact remain as to the scope of Butterfield's responsibilities, as to the nature of his actions in the Fitzgerald matter beginning in the spring of 1969, and as to whether such actions as he did take were performed in good faith. Accordingly, summary judgment cannot be granted at this time to Butterfield by reason of any immunity defense, whether he be entitled to claim an absolute or a qualified immunity.

ORDERED that defendants' motions to dismiss or, in the alternative, for summary judgment are granted in the following respect:

Plaintiff's action against defendant Haldeman is time-barred. The statute of limitations was no longer tolled by operation of the "fraudulent concealment" doctrine once plaintiff had sufficient facts to put him on notice that he had a potential claim. *See Emmett* v. *Eastern Dispensary & Casualty Hospital,* 396, F.2d 931, 937-38 (D.C. Cir. 1967); *Westinghouse Electric Corp.* v. *City of Burlington, Vermont,* 351 F.2d 762, 764 (D.C. Cir. 1965); *Cole* v. *Kelley,* 438 F. Supp. 129, 139 (C.D. Cal. 1977). Plaintiff filed his First Amended Complaint naming Haldeman on June 27, 1977. Plaintiff, however, knew that Haldeman was actively involved in the Fitzgerald matter after having taken the deposition of Butterfield on June 15, 1974. *See* Butterfield deposition at 260, 271, 298, 324. *See also* Butterfield Memorandum of Jan. 20, 1970, addressed specifically to Haldeman (Discovered by Plaintiff in August, 1973).

ORDERED that, plaintiff having withdrawn his claim under the Ninth Amendment to the United States Constitution, his claim for unconstitutional and common-law invasion of privacy, and his claims under 42 U.S.C. §§ 1985(3) & 1986, these claims be and hereby are dismissed; and it is further.

ORDERED that, since the issue is currently before the Supreme Court, *see Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc), *cert. granted*, 47 U.S.L.W. 3301 (U.S. Oct. 20, 1978), of whether or not, under the rational of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra*, a private damage remedy may be based on a Fifth Amendment violation, this Court will not now decide whether plaintiff states a cause of action under the Fifth Amendment.

/s/ GERHARD GESELL
United States District Judge

April 26, 1979.

UNITED STATES
CIVIL SERVICE COMMISSION

APPEALS EXAMINING OFFICE
WASHINGTON, D.C. 20415

Decision

ON THE APPEAL OF

A. ERNEST FITZGERALD
DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C.

Herman D. Staiman
CHIEF

ISSUED September 18, 1973

APPEAL OF A. ERNEST FITZGERALD UNDER PART 351, SUBPART I OF THE CIVIL SERVICE REGULATIONS

Appeal from the action of the Department of the Air Force in separating the appellant by reduction-in-force from the position of Deputy for Management System, GS-17, Step 4, $31,874.00 per annum, Office of the Secretary, Assistant Secretary for Financial Management, Washington, D.C. effective January 5, 1970.

INTRODUCTION

By letter dated January 20, 1970 John Bodner, Jr. and William L. Sollee, Attorneys at Law, submitted an appeal to this office in behalf of Mr. A. Ernest Fitzgerald. Investigation was conducted and numerous lengthy submissions to the file were received from both the appellant and the agency. The appellant raised a question as to the bona fides of the reduction-in-force (RIF) as it was applied to him, contending that the RIF was used as a subtufuge to conceal the agency's action in firing him because of his November 13, 1968 testimony on the C-5A cost overruns. Since Mr. Fitzgerald was a preference eligible and the various submissions to the file did constitute a prima facie showing that the reduction-in-force may have been based upon an intention to separate the appellant for cause rather than for a nonpersonal reason, a hearing was scheduled to inquire into the circumstances surrounding the RIF.

The agency was requested and agreed to make available to testify Secretary of the Air Force Robert Seamans, Assistant Secretary Spencer Schedler, Administrative Assistant to the Secretary John Lang, Deputy Administrative Assistant Thomas Nelson, Air Force Chief of Staff General John D. Ryan, Comptroller of the Air Force Lieutenant General Duward Crow, Director of Office of Special Investigations (OSI) Brigadier General Joseph J. Cappucci, and Colonel James D. Pewitt.

In accordance with the Civil Service regulations in effect at that time, the hearing was not open to the public. However, a verbatim transcript of the proceeding was prepared by an independent court reporting firm. The hearing was conducted on May 4, 5; June 16, 17, 18 and 22, 1971. On the latter date the hearing was suspended in compliance with a temporary restraining order and subsequent injunction issued by the U.S. District Court for the District of Columbia relative to the issue of an "Open Hearing". The hearing, open to the public, resumed on January 26, 1973 after all litigation on this issue had been completed. Additional hearing sessions were held on January 29, 30, 31; February 2, 28; March 5, 6, 7, 20, 21, 22, 28, 30; April 3, 4, 5, 6, 19; and May 3, 1973.

[2] Since the 1973 portion of the transcript begins again with page #1, reference to the 1971 portion of the transcript will be shown as "L/N" while reference to the 1973 portion will be shown as "TR". On May 3 & 4, 1971 the agency submitted copies of documents previously furnished to the Justice Department. The pages are numbered consecutively from 1 to 117 with two (2) pages numbered 95. This submission will be referred to as the "Justice File" and the two pages 95 will be referred to as 95a and 95b. On June 25, 1970 the agency submitted 409 pages of documents in response to the appellant's request. This submission will be referred to as "AF-6/25/70". All agency submissions will be referred to as "AF-(date)" and all appellant's submissions will be referred to as "APP-(date)". Exhibits submitted at the hearing will be referred to as "M.Ex" for management and "A.Ex" for appellant. Senator William Proxmire was Chairman of the Subcommittee on Economy in Government of the Joint Economic Committee, Congress of the United States. This Subcommittee will be referred to as the "Proxmire Committee". The office of the Assistant Secretary of the Air Force for Financial Management will be referred to as "SAFFM", its Air Force symbol.

Final closing arguments, in the form of no reply written briefs were received from the Air Force on July 16, 1973 and from the appellant on July 17, 1973. While the record was technically closed as of May 3, 1973 a newly discovered memorandum that had just surfaced in a Senate hearing was

submitted by the appellant on August 2, 1973. No objection or comment was offered by the agency, therefore, the document was accepted into the record.

A verbatim transcript of the entire 26 day hearing proceeding is a part of the official record in this case. The appellant was represented at the hearing by his attorneys, John Bodner, Jr. and William L. Sollee. The agency was represented by Lieutenant Colonel C. Claude Teagarden, Office of the General Counsel, Department of the Air Force, and Hugh R. Gilmore, Assistant General Counsel, Department of the Air Force. Testimony at the hearing was obtained from the appellant and thirteen of the witnesses he requested. The agency called no witnesses, and presented its case through the cross examination of appellant's witnesses, the introduction of new documents, and reliance on the material previously submitted.

ANALYSIS AND FINDINGS

By letter dated November 4, 1969 the agency gave Mr. Fitzgerald notice of his proposed separation by reduction-in-force, effective January 5, 1970, due to the abolishment of his position, "necessitated by a reorganization under the current Air Force retirement program". This notice indicated that his assignment rights were to positions in the Excepted Service. The Standard Form 50 (SF-50), Notification of Personnel Action, effecting the separation on January 5, 1970, identified the position as being in the Excepted Service.

Mr. Fitzgerald contends that he was granted career tenure in the competitive service on September 20, 1968 and that it was improperly taken away from him on November 25, 1968 after he testified as to the cost overruns on the C-5A airplane. Accordingly, we will deal with this issue first.

[3] The record reveals that on September 20, 1965 Mr. Fitzgerald received an Excepted-Conditional appointment to the position of Deputy for Management Systems, GS-301-17, in the Office of the Assistant Secretary of the Air Force for Financial Management (SAFFM). This position was excepted from the competitive service under Schedule A, Section

213.3109a of the Civil Service regulations. The appointment SF-50 clearly shows in items 12 and 28 that the appointment was to an Excepted Service position.

Effective September 20, 1968, upon Mr. Fitzgerald's completion of three (3) years in the Excepted Service a new SF-50 was issued. In item 12 the nature of the action was shown as a conversion to career tenure; in item 14, the Civil Service authority was shown as Reg. 315.202; and in item 28 the position occupied was shown as being in the Excepted Service. On November 25, 1968 a new SF-50 was issued correcting item 12 of the September 6, 1968 SF-50 to reflect conversion to Excepted appointment and correcting item 14.

Mr. Fitzgerald contends that based upon the September 1968 SF-50 he was converted from the Excepted to the Competitive service and that the corrected SF-50 of November 25, 1968 improperly took away his career tenure in the competitive service.

Section 6-5, Rule VI of the Civil Service Rules relating to excepted employees states:

> "No person who is serving under an excepted appointment shall be assigned to the work of a person in the competitive service without prior approval of the Commission."

Section 315.701, Part 315 of the Civil Service regulations concerning conversion of incumbents of positions brought into the competitive service, states:

> "(b) An agency, within the time limits set forth in paragraph (c) of this section, may recommend that the employment of an employee covered by paragraph (a) of this section be converted to career or career-conditional employment.
>
> (d) When the Commission approves the agency's recommendation submitted under paragraph (b) of this section, the employee becomes:

(1) A Career conditional employee . . .
(2) A Career employee . . ."

It is clear from the evidence of record, and we so find that the Air Force did not request or receive approval from the Commission to move Mr. Fitzgerald from the excepted service to the competitive service or to move his position [4] from the excepted to the competitive service (A.Ex #1; A.Ex #7, P 286-287; Justice File, P-7; AF-6/25/70, P-114; AF-1/30/70; and TR 2768-2769).

Contrary to the appellant's contention, the perfunctory forwarding of a file copy of every SF-50 to the Civil Service Commission is not an agency recommendation or request for prior Commission approval nor does this serve as the prior approval by the Civil Service Commission for any conversion from the Excepted to the Competitive Service.

Since the Air Force never recommended, requested, or received prior approval from the Civil Service Commission to convert Mr. Fitzgerald from the Excepted Service to the Competitive Service the Air Force was clearly without authority to take this action. Therefore, we find that the original conversion action of September 1968 was null and void, and that it was properly corrected by the agency on November 25, 1968.

The agency has contended that the initial SF-50 of September 1968 resulted from a computer error. This is borne out by the fact that item 28 of that SF-50 showed the position occupied to be in the Excepted Service. It is further borne out by item 14 which cited the Civil Service Authority as Regulation 315.202. Section 315.202 of Part 315 of the Civil Service regulations states:

> "A career-conditional employee becomes a career employee automatically on completion of the service requirement for career tenure."

The service requirement for conversion from career conditional to career as set forth in Section 315.201 is three (3) years. Mr. Fitzgerald did not receive a Career-Conditional appointment, he received an Excepted-Conditional appointment.

Therefore, he had no entitlement to the automatic conversion from Career-Conditional to Career that Section 315.202 provides.

In view of the foregoing, we find that Mr. Fitzgerald was properly in the Excepted Service at the time of his separation on January 5, 1970 and that he had no entitlement to Career tenure in the Competitive Service.

Turning now to the reduction-in-force action itself, the agency's position is that as part of Defense Department's Project 703, the Air Force was required to reduce expenditures one (1) billion dollars in fiscal year 1970. This involved large cut-backs in military and civilian personnel nationwide and in the headquarters staff of the Department. Each office in the Secretariat was given a specific number of reductions to be effected. SAFFM was assigned a net reduction of two (2) spaces. As part of a reorganization of that office five (5) positions were abolished and three (3) new positions were established. Of the five (5) positions abolished Mr. Fitzgerald's was the only professional position. The other four (4) were secretarial positions.

[5] The agency contends that the abolishment of Mr. Fitzgerald's position, initiated by Assistant Secretary Spencer J. Schedler and approved by Secretary Robert Seamans, was based upon a valid management decision to reorganize SAFFM in order to improve its cost effectiveness capability and at the same time achieve the required reduction of two (2) spaces.

The agency further contends that Secretary Seamans and Assistant Secretary Schedler were not in office at the time of Mr. Fitzgerald's November 1968 testimony; that they alone were responsible for the decision to reorganize the financial management office; that the testimony Mr. Fitzgerald gave a year earlier was not the reason or a reason for their decision; and that neither had sought or received any instructions to abolish the appellant's position.

Mr. Fitzgerald contends that the RIF as applied to him was not for non-personal reasons and was, in essence, an agency adverse action based upon his November 13, 1968 testimony on the C-5A cost overruns.

The record reveals that out of the 80 positions abolished in the Office of the Secretary of the Air Force, Mr. Fitzgerald was the only employee who actually was issued a RIF notice and who was actually separated by RIF (L/N 723-724). As his part of the Project 703 reductions, Assistant Secretary Schedler was required to take a cut of two (2) spaces. He accomplished this by abolishing four (4) Secretarial positions plus Mr. Fitzgerald's position and creating three (3) new positions.

The Air Force, through the testimony of witnesses and documentary evidence, did show that a reorganization of SAFFM had taken place; that the appellant's position had been abolished and not recreated; and that there was some need to reorganize in addition to reducing the office staff by two (2) positions.

The appellant has not questioned the validity of the Project 703 reductions and the resultant reduction-in-force, only the agency's decision to abolish his position and include him in that RIF.

The reduction-in-force system as provided for by Statute and Commission regulations is a system for releasing employees from their competitive levels when their release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights. The system is predicated upon the concept of competition for retention based upon tenure, veterans preference, length of service and performance rating.

Reduction-in-force may be necessary because of conditions inside or outside the agency. Agency management may reduce certain phases of its work as the workload changes. Appropriations may be reduced or cut-off entirely, or the agency may be allowed to use only part of its appropriations. These and other [6] factors occurring singly or in combination may make it necessary for the agency to have a reduction-in-force.

Reduction in force may require the separation of all employees in part of an agency or may require separation of some and shifting about of others. Small reductions may require no involuntary separations, when there are enough

transfers, retirements, and other voluntary losses. Some reductions, in fact, require no reduction in the number of employees but are accomplished through reorganization.

Planning the work program and organizing the work force to accomplish agency objectives within available resources are management responsibilities. Only the agency can decide what positions are required, where they are to be located and where they are to be filled, abolished or vacated. The agency determines when there is a surplus of employees at a particular location in a particular kind of work. A surplus of employees in any part of an agency requires the agency to determine whether the employees will be assigned to vacant positions, be adversely affected for reasons related to performance or conduct or compete in reduction in force.

These are management responsibilities and the management determinations regarding these responsibilities are not ordinarily subject to review by the Civil Service Commission in a reduction-in-force appeal.

It would be a valid and proper exercise of its management prerogative for an agency faced with the necessity for reducing its force to select for abolishment those functions and/or positions that are least necessary to the accomplishment of, or are making the least substantive contribution to, the agency's mission.

In this situation the lack of substantive contribution may be due to a change in the agency's mission or its method or approach to the accomplishment of it's mission. It may also be that the lack of substantative contribution is due to the incumbent of the position.

Inherent in the Commission's reduction-in-force system and one of its fundamental precepts is that it be used only for reasons that are non-personal to the employees affected. The reduction-in-force system must not be used to remove inadequate or unsatisfactory employees in lieu of following the Commission's adverse action procedures set forth in Part 752 of the Civil Service regulations.

Federal Personnel Manual Chapter 351, Subchapter 1 states in part as follows:

"1-9. IMPROPER USE OF REDUCTION IN FORCE

> There sometimes has been a tendancy to distort the reduction-in-force system by using it to eliminate inadequate employees."

[7] Thus, an allegation that the RIF was a subterfuge to conceal an agency removal action taken without following the adverse action procedures, when supported by a sufficient showing that the RIF action may have been based upon an intention to separate the appellant rather than upon a non-personal reason for reducing the force, goes directly to the question of the bona-fides of the RIF and will be reviewed on appeal.

In order to properly evaluate the propriety of the RIF action as applied to Mr. Fitzgerald it is essential that we review and analyze the circumstances leading up to and surrounding the decision to abolish his position and to include him in the Project 703 RIF.

From our review of the complete appellate record including all submissions by both parties and the transcript of the hearing (26 days), we find the circumstances to be as follows:

Mr. Fitzgerald received an excepted appointment to the position of Deputy for Management Systems, Office of the Assistant Secretary of the Air Force for Financial Management (SAFFM) on September 20, 1965 (AF-1/30/70, Attachment #4). While no specific time limit was established as to the length of this appointment, it is clear from Mr. Fitzgerald's testimony of his conversations with the then Assistant Secretary, Dr. Leonard Marks, that it was to be for only a few years (TR 2618-2621).

Assistant Secretary Marks resigned on December 31, 1967 and was succeeded by Thomas H. Nielsen who was appointed Assistant Secretary for Financial Management on January 1, 1968 (L/N 366). Mr. Nielsen submitted a proposed reorganization plan for his office dated January 9, 1968 (AF-6/25/70, P-253) focusing additional attention on cost performance,

designating the appellant as the focal point for this effort and proposing increasing his staff.

Mr. Fitzgerald was first contacted by the Proxmire Committee in the Summer of 1968 to testify on the C-5A (TR 2720-2722). This request was put into writing by Senator William Proxmire on October 18, 1968 (APP-1/20/70, Attachment #2).

The file contains unrefuted allegations and testimony that there was high level Air Force and D.O.D. opposition to Mr. Fitzgerald testifying.

Mr. Fitzgerald did testify before the Proxmire Committee on November 13, 1968 and discussed possible cost overruns on the C-5A plane. This testimony received a great deal of publicity for it was the first public disclosure of cost overruns on that project.

In October 1968 Colonel James D. Pewitt, Special Assistant for Economic Analysis and Acting Executive Officer of SAFFM, was involved in conducting a cost review of the C-5A project. He testified that Mr. Fitzgerald used his [8] (Pewitt's) figures in testifying before the Proxmire Committee (TR 1970); that Mr. Fitzgerald's testimony was accurate; and that the numbers Fitzgerald used were the same numbers he would have used (TR 1969-1970).

On November 25, 1968 a new SF-50 was issued to Mr. Fitzgerald properly correcting an erroneous SF-50 issued on September 6, 1968 which had purportedly granted him career tenure.

By memo dated December 26, 1968, Mr. Fitzgerald furnished Assistant Secretary Nielsen copies of the September 6 and November 25, 1968 SF-50's regarding his tenure and pointed out that the November 25 revocation came less than two weeks after his appearance before Senator Proxmire's Subcommittee.

In response to a December 27, 1968 request from Assistant Secretary Nielsen, John A. Lang, Jr., Administrative Assistant to the Secretary of the Air Force submitted a memorandum explaining Mr. Fitzgerald's tenure situation (Justice File P-6).

A copy of this memo was delivered to Mr. Fitzgerald by Major Metcalf on December 31, 1968 (M.Ex #7, 1/13/69 attachment).

On January 1, 1969 a front page newspaper article appeared in the Washington Post (attachment to M.Ex #7) clearly implying that the November 25, 1968 revocation of tenure was in retaliation for Mr. Fitzgerald's testimony on the C-5A on November 13, 1968.

In response to request for information (L/N 449-451) due to the implications in the January 1, 1969 Washington Post front page article, Acting Secretary of the Air Force, Dr. Alexander N. Flax sent a memo to the Secretary of Defense dated January 2, 1969, explaining Mr. Fitzgerald's tenure situation (AF-6/25/70, P 112-116).

On Friday afternoon, January 3, 1969, Mr. Thomas Nelson, Deputy Administrative Assistant to the Secretary of the Air Force, received a request from Colonel Gunderson of the Air Force Secretary's Office to prepare a paper bringing the Secretary of the Air Force up to date on what was going on with regard to Fitzgerald, and also a discussion of what his rights were, since the Secretary had been out of the office for a week to ten days (L/N 452-453). John Lang furnished this information to Secretary Brown by memo dated January 6, 1969 (M.Ex #44). Attached thereto was a copy of Dr. Flax' memo of January 2, 1969 to the Secretary of Defense. The January 6, 1969 memo is referred to as the "Lang Memo".

Mr. Nelson testified that he assumed the request, "What are his rights" meant what are his rights when he is going to be terminated (L/N 463-466). Mr. Fitzgerald received a copy of the "Lang Memo" from Assistant Secretary Nielsen (L/N 474, 476-477) on January 8, 1969.

The Lang Memo identifies three (3) possible means of effecting Mr. Fitzgerald's departure and states in part as follows:

> [9] "As an employee in the excepted service under Schedule A, with Veterans Preference, Mr. Fitzgerald has certain rights, which can be grouped in two categories:

(1) *Adverse Actions.* Chapter 752 of the Federal Personnel Manual applies to discharges, suspensions, furloughs without pay, and reductions in rank or compensation taken by agencies against employees of the United States Government. Mr. Fitzgerald's rights are:

(a) Adverse action may not be taken except for such cause as will promote the efficiency of the service;

(b) He must be given at least 30 full days advance written notice, identifying the specific proposed action, stating the reasons supporting the proposed action, including names, times and places;

(c) The notice must tell the employee that he has the right to reply, both personally and in writing and to submit affidavits in support of his answer;

(d) Normally he must be retained in an active duty status during the notice period;

(e) Full consideration must be given to his reply and if the decision is to effect the action originally proposed, or some action less severe, he must be given a dated and written notice of the decision promptly after it is reached;

(f) The notice of decision must inform him of the effective date of the action, of his right to appeal the adverse action within the agency and to the Civil Service Commission, and of the time limits and procedures for making the appeals.

(2) *Reduction in Force.* In the event his job is abolished, Mr. Fitzgerald is in Tenure Group I in the Excepted Service and has the right of full application of all reduction-in-force procedures insofar as "bumping" and "retreat" rights within his competitive level grouping. However, since he is the only employee in his competitive level grouping and since he did not progress to this position from other lower grade positions, the net result is that he is in competition only with himself. He could neither "bump" nor displace anyone.

[10] These are the rights involved should charges be preferred or should his position be abolished. There is a third possibility, which could result in Mr. Fitzgerald's departure. This action is not recommended since it is rather underhanded and would probably not be approved by the Civil Service Commission, even though it is legally and procedurally possible. The Air Force could request conversion of this position to the career service, utilizing competitive procedures, and consider all the eligibles from the Executive Inventory and an outside search. Using this competitive procedure, Mr. Fitzgerald might or might not be selected. If not, displacement action would follow.

> When Mr. Fitzgerald was appointed in September 1965 by Assistant Secretary Marks to fill the vacancy created by the departure of Mr. J. Ronald Fox, it was with a mutual understanding that this was to be a Schedule A appointment of two or three years duration. There is nothing in official records to support this understanding. Dr. Flax contacted Mr. Marks by telephone on January 2, 1969, and verified this understanding and reflected the conversation in his memorandum to the Secretary of Defense, a copy of which is attached. We have carefully screened all files and records and can find no formalized confirmation of this understanding."

Mr. Fitzgerald visited the Civil Service Commission on January 10, 1969 to complain of the alleged loss of tenure and his supervisor's statement that his usefulness to the Air Force was at an end. Therefore, Assistant Secretary Nielsen prepared a memorandum for record (M.Ex #7, 1/13/69 attachment). This memo states that Mr. Nielsen reviewed the entire matter of the tenure controversy with Mr. Fitzgerald who stated that he mailed a copy of the first SF-50 to the Committee immediately after the conclusion of the November 13, 1968 hearing and that when the second form was received it was mailed directly to the Proxmire Committee. The memo also states that Mr. Nielsen told the appellant "I felt his actions in this connection had ended his usefulness to the Air Force".

Secretary Seamans testified it was his belief that Mr. Fitzgerald released the SF-50's in the tenure controversy in order to obtain publicity and to place the Air Force in a bad light (TR 430-431, 435-437); that his actions inflamed the situation; exacerbated relations between Mr. Fitzgerald and people in the Secretariat; and "that's when it became much more of a confrontation" (TR 480-481). Secretary Seamans also stated that Mr. Fitzgerald was a celebrity and a controversial person at that time as a result of the press releases concerning the tenure controversy (TR 438-439).

Colonel Pewitt testified that Assistant Secretary Nielsen gave Mr. Fitzgerald the "Lang Memo"; that Mr. Nielsen felt Fitzgerald "had betrayed a personal confidence" by the way the memo was handled; and that Mr. Nielsen lost confidence [11] in the appellant and his usefulness to the Air Force (TR 1991-1992). Colonel Pewitt also stated that he thought Mr. Fitzgerald's days in the Air Force were numbered and that he might be leaving because of the tenure-non tenure publicity and the Lang Memo (TR. 2121-2122).

It is clear that the "Lang Memo" and Secretary Nielsen's declaration that Mr. Fitzgerald had lost his usefulness to the Air Force both stemmed from the Washington Post January 1, 1969 front page article erroneously implying that the appellant lost his career tenure in retaliation for his testimony on the cost overrun in the C-5A project. It is also evident that the Air Force considered Mr. Fitzgerald responsible for this erroneous implication reaching the news media.

Robert C. Seamans, Jr. took office as Secretary of the Air Force on February 15, 1969. Assistant Secretary Nielsen submitted new reorganization proposals to Secretary Seamans on February 26, 1969 (AF-6/25/70, P-292) and May 5, 1969 (M.Ex#11). Prior to submitting the February 26, 1969 reorganization plan, Mr. Nielsen told Secretary Seamans that Mr. Fitzgerald's usefulness to the Air Force was at an end (TR 526-527). Secretary Seamans testified that the February 26, 1969 proposal was similar to the one that Mr. Nielsen had submitted a year earlier except for changing the focal point for

cost analysis capability from Mr. Fitzgerald to Colonel Pewitt (TR 530-531).

Secretary Seamans testified that on or about April 24, 1969 Mr. Fitzgerald was scheduled to give a talk to the American Management Association on the West Coast for the Air Force. He did not meet that committment, apparently because he was giving a series of lectures up at the Capitol (TR 559-561; 570-572). As a result, Assistant Secretary Nielsen had to fulfill this committment in the appellant's place.

On May 5, 1969 Mr. Nielsen submitted his final proposed reorganization plan for SAFFM (M.Ex #11). This plan did not provide for Mr. Fitzgerald's position of Deputy for Management Systems.

On May 7, 1969 Secretary Seamans testified before the House Armed Services Committee in Executive Session and made several accusations against Mr. Fitzgerald. The following quotations dealing with these accusations are taken from pages 2593, 2594 and 2596 of the Committee Hearing report for May 7, 1969 (APP-4/28/71 attachment).

> "Secretary Seamans. I think if you are looking at the record that you should also note where he is spending time off duty as well as on Government time."
>
> Secretary Seamans. . . . I am not saying this is wrong, mind you, but he is working with a group of staff people up on the Hill, among them Congressman Moorhead's chief of staff. He [12] was scheduled to go and make a speech on the west coast, which I approved. He wanted to make the speech. I said go ahead. And then he backed out of it at the last minute because he was so busy up here doing his extracurricular work. We had difficulty filling the speaking assignment."
> "Mr. Stratton. Mr. Fitzgerald is up there now, and has been for the last several weeks, as I understand it.
>
> Secretary Seamans. I'm not familiar with detail. I do know there is a group that engages in a so-called seminar. It may be perfectly appropriate, but it is not

official Air Force business. It is nothing that has been scheduled with a committee through the Secretary of the Air Force or any other responsible Air Force official."

"Secretary Seamans. In my conversation, a little earlier, I was talking about some of the reports that came out of the Holifield committee, some of which are confidential, that as indicated by Congressman Moorhead, he received from Mr. Fitzgerald.

Mr. Hunt. Did Mr. Fitzgerald have the permission of the Air Force to release that information?

Secretary Seamans. He certainly did not.

Mr. Hunt. What is being done about Mr. Fitzgerald, then?

Secretary Seamans. I'm reviewing the case.

Mr. Hunt. Will you advise us what you are doing with the case when you are finished?

Secretary Seamans. I certainly will."

In addition, the following exchange took place between the Chairman of the Committee and Secretary Seamans:

The Chairman. Is he still on the Air Force payroll?

Secretary Seamans. He is still on the Air Force payroll, he works in the Financial Management Office.

The Chairman. If I had a fellow like that in my office, he would have been long gone. You don't need to be afraid about firing him."

[13] Secretary Seamans testified at the Commission's hearing that he was not fully satisfied with Mr. Fitzgerald's performance; that he (Fitzgerald) was not taking his responsibilities to the Air Force seriously enough (TR 868-869); that he was not fulfilling his duties (TR 872-874); and that he (Seamans) had stated to the Committee on May 7, 1969 that Mr. Fitzgerald had leaked confidential documents (TR 882). Sec-

retary Seamans testified that on the day after his May 7, 1969 testimony he learned that no security violation was involved (TR 636); that the word "confidential" did leave an ambiguity (TR 637); that some damage was done (TR 637); and that it wasn't until six months later that he apologized to the Committee for his remarks being interpreted as a security violation (TR 617, 637, 892).

Brigadier General Joseph J. Cappucci, former Director of the Air Force Office of Special Investigations (OSI), testified that on May 17, 1969 OSI opened a file, HDQ 24P-12052 and started a special inquiry based on conflict of interest charges made against Mr. Fitzgerald by a confidential informant. Subsequently three (3) more people volunteered information in June and July (TR 48-49). A number of checks were made (TR 61-62) to test the substance of the allegations. These were in Washington, D.C.; in New York, (TR 64); Boston, (TR 70); and in Los Angeles to interview Leonard Marks (TR 83-85). All the checks came back favorable (TR 111, 119) but this favorable information was not placed in the file (TR 111).

General Cappucci testified that when these checks came back favorable, instead of placing the favorable information in the file he closed it and was going to destroy the file when it was impounded (TR 112-113). All the favorable reports were destroyed (TR 115, 120).

We find no credible explanation for OSI retaining the derogatory allegations about Mr. Fitzgerald while destroying all of the results of the investigation which proved that these allegations were without substance. General Cappucci went to great lengths to try and distinguish between a "Special Inquiry" and an "Investigation". However, it was a fruitless exercise in semantics in this case.

General Cappucci also testified that the June 24, 1969 memorandum report of interview with Leonard Marks (Justice File P-95), which clearly showed that there was no substance to the conflict of interest allegations, was not in the OSI file when he sent it to "The Hill" (TR 157-162). We find it unconscionable for OSI to have shown only the derogatory allegations without also showing the results of the investigation which

laid to rest these allegations. We can only view this as an attempt to justify Mr. Fitzgerald's separation.

General Cappucci testified that he was not directed by anyone to open the special inquiry on Mr. Fitzgerald; that he did not disclose the fact that the inquiry was opened or the facts of that inquiry, to Secretary Seamans, Assistant Secretary Nielsen, Assistant Secretary Schedler or anyone else in the Executive Branch of the Government outside the OSI prior to November 4, 1969 (TR 198). General Cappucci also testified that Secretary Seamans first learned of the existance of the OSI file when the General gave the Secretary a few minute briefing on November 17 or 18 [1969], the day before he testified before the Proxmire Committee (TR 154-155).

[14] In his testimony before the Proxmire Committee on November 17, 1969, in discussing the reorganization of the SAFFM Office and Mr. Fitzgerald's resultant RIF, Secretary Seamans stated that he and Mr. Laird the Secretary of Defense made an effort for many months to find a way to use Mr. Fitzgerald in some other capacity; that they talked to him personally; and considered him for other positions in the Department of Defense but did not find a suitable solution (APP-2/9/71, Attachment 1, P 102-103).

Secretary Seamans testified that he first gave consideration to finding another job for Fitzgerald outside the Air Force about the middle of May. This was shortly after he learned that the appellant had transmitted documents to Congress and learned the appellant had not fulfilled his committment to deliver the West Coast address (TR 707-708). Secretary Seamans believed that a job for Mr. Fitzgerald in DOD would be uncluttered by some of the unfortunate relationships that had arisen in the Air Force (TR 708).

Mr. Fitzgerald testified that he met with Secretary of Defense Melvin Laird on June 11, 1969; that the Secretary was very friendly but told the appellant that he had become a personnel problem in the Air Force, which the appellant conceded was probably true; and that he would have to go someplace else. They discussed what might be done in other areas of DOD (TR 2866-2871).

One of the positions under consideration was an assignment on the staff of the Fitzhugh DOD Blue Ribbon Panel (TR 714-723, 2872). Mr. Fitzgerald had meetings with Mr. Fitzhugh and Mr. Buzzard, the Staff Director, and then submitted an August 25, 1969 memo to these men (AF-6/25/70, P-118) which stated in part:

> "On the second point, I am not the only action-oriented cost cutter now excluded from the business. Aside from publicity, my situation is unique only in that I have not gone away quietly as have most others of my experience and bent."

After receipt of this memo Mr. Fitzhugh informed Secretary Seamans that he was not going to recommend Mr. Fitzgerald for assignment to the staff (TR 728). Secretary Seamans properly considered the above quoted statement to be a fairly inflammatory kind of statement to put into a memo related to consideration for another position (TR 729-31). The Secretary considered that Mr. Fitzgerald had a chip on his shoulder (TR 729-731). It is clear that Mr. Fitzgerald was not interested in a position on the Fitzhugh Panel as evidenced by the tenor of his August 25, 1969 memo.

Spencer J. Schedler replaced Thomas Nielsen as Assistant Secretary of the Air Force for Financial Management on June 24, 1969. Mr. Schedler testified that [15] he saw the "Lang Memo" in the summer of 1969. He testified that he considered Mr. Fitzgerald's performance deficient in regard to the instances of the preparation of a "Should Cost Primer" and his failure to have prepared a demonstration guide (TR 1683-1694). Mr. Schedler testified that he first decided to abolish Mr. Fitzgerald's position in late September or early October 1969 when it became evident to him that as a result of the Project 703 cutbacks he would not be able to add spaces to the SAFFM office to improve its analytical capability (TR 1791-1792).

On November 3, 1969 Mr. Schedler submitted a form 52 request to abolish Mr. Fitzgerald's position by reorganization. This request was approved by Secretary Seamans on the same day. Thereafter, by letter dated November 4, 1969, Mr.

Fitzgerald was notified of his proposed separation by reduction-in-force which was effected on January 5, 1970.

On November 17 and 18, 1969 the Proxmire Committee held hearings on Mr. Fitzgerald's proposed termination by RIF.

Secretary Seamans testified at the Commission's hearing that between November 4 and 18, 1969 the date of his appearance at the Committee hearing he saw and/or communicated with Republican Senators Jordan and Percy and Republican Congressmen Brown and Conable concerning Mr. Fitzgerald's RIF (TR 777-778, 857-858, 860). The Secretary admitted mentioning to Senator Percy that Mr. Fitzgerald was not a team player (TR 782) and that there had been difficulties in the relationship between Fitzgerald and the Air Force (TR 780). Secretary Seamans also told Senator Jordan of these relationship difficulties; however, he denied that they were the reason for the RIF; and he did not recall using the term "team player".

On May 7, 1973 former Senator Jordan was sent several written interrogatories. His written replies were received May 19, 1973. In answer to one question Mr. Jordan recalled Secretary Seamans stating Mr. Fitzgerald was a troublemaker, that he was not a team player and that he was terminated for economy reasons under a reduction in force designation.

In view of the above and the fact that Secretary Seamans did mention the team player situation to Senator Percy, we must conclude that he also used that term in talking to Senator Jordan.

Assistant Secretary Schedler testified that during the same period of time he visited Republican Senators Mundt and Murphy and Republican Congressmen Broyhill, Buchanan, Conable, Dickinson and Rhodes to explain Mr. Fitzgerald's RIF (TR 1377).

There is a conflict in the evidence as to whether or not Assistant Secretary Schedler told Congressman Dickinson that Mr. Fitzgerald was not a team player. Congressman Dickinson testified (TR 2285) that at their November 11, 1969 meeting

Mr. Schedler used the term "not a team player" and the Congressman confirmed the accuracy of a November 19, 1969 newspaper article quoting him as saying that Mr. Schedler told him Mr. Fitzgerald was not a team player (APP-2/9/71, Attachment #1, P 202-203).

[16] Michael L. Lehrman, a former fellow classmate of Mr. Schedler at Harvard, testified that he met Mr. Schedler at an Air Force Association Convention in September 1970. Mr. Lehrman testified that at this meeting Mr. Schedler made uncomplimenting remarks about Mr. Fitzgerald, stated that he was "a pain in the ass" and was not a "team player" (TR 2885-2896).

From all of the above we must conclude that Mr. Schedler did tell Congressman Dickinson that Mr. Fitzgerald was not a team player, or used words to that effect.

After carefully reviewing the complete appellate record we find the evidence of record does not support the appellant's allegation that his position was abolished and that he was separated by RIF in retaliation for his having revealed the C-5A cost overrun in testimony before the Proxmire Committee on November 13, 1968.

In summary, the record reflects that the C-5A contract was negotiated during a Democratic Administration. Secretary Seamans and Assistant Secretary Schedler were not in office at the time the contract was negotiated or at the time of Mr. Fitzgerald's testimony, before the Proxmire Committee on November 13, 1968. In fact, Secretary Seamans did not take office until February 1969 and Assistant Secretary Schedler not until June 1969, three (3) and seven (7) months later respectively; and under a Republican Administration.

Secretary Seamans agreed that there was a large cost overrun on the C-5A project and that Mr. Fitzgerald was acting properly in testifying after being called by the Committee. In addition, a number of witnesses agreed with Mr. Fitzgerald's estimate of the possible magnitude of the overrun.

As we have previously found, and as the Air Force knew, Mr. Fitzgerald was not entitled to career tenure. The Civil

Service Commission had not been requested nor had it granted prior approval to the Air Force to convert Mr. Fitzgerald from the Excepted to the Competitive Service. The September 6, 1968 SF-50 was erroneously issued, obviously due to a computer error, and was properly corrected by the November 25, 1968 SF-50 to show that Mr. Fitzgerald was converted from "Excepted-Conditional to "Excepted" upon completion of three years of service, effective September 20, 1968.

The Lang Memo of January 6, 1969 and Assistant Secretary Nielsen's January 8, 1969 comment to Mr. Fitzgerald, which Mr. Nielsen made the subject of a memo for record on January 13, 1969, that his usefulness of the Air Force had come to an end did not stem from his testimony before Congress on November 13, 1968. These two pronouncements resulted directly from the January 1, 1969 Washington Post front-page story that carried a clear but erroneous implication that Mr. Fitzgerald's career tenure had been revoked in retaliation for his November 13, 1968 testimony. Secretary Seamans, and others in the Air Force considered Mr. Fitzgerald to be a publicity seeker; that the appellant was [17] directly or indirectly responsible for the erroneous January 1, 1969 Washington Post story; and that Mr. Fitzgerald had done this for the purpose of placing the Air Force in a bad light.

We find that the unjust publicity the Air Force received concerning this tenure controversy, which it considered Mr. Fitzgerald to be basically responsible for, was the prime factor in the deterioration of relationships and development of an adversary environment between Mr. Fitzgerald and the Air Force.

We note that Mr. Fitzgerald received his appointment in September 1965 during a Democratic Administration, and in his own words the appointment was to be for only a few years. Mr. Fitzgerald's position carried with it the qualifications requirement that he "be personally acceptable to the Assistant Secretary of the Air Force (Financial Management)" (A-6/25/70, P-145). By the end of December 1968 the appellant's "few years" had gone by; a Republican Administration would

soon be coming into office; and thus it appeared that Mr. Fitzgerald could possibly soon be leaving.

While Mr. Fitzgerald has denied that he was "Senator Proxmier's boy in the Air Force", and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without specifically saying so, considered him to be just that. The statements that he was not a "team player" and "not on the Air Force team" go directly to that point. We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for the appellant.

It is also clear that probably by January 1969, and certainly no later than May 1969, Mr. Fitzgerald had achieved controversial status and was an Air Force personnel problem as his testimony concerning his meeting with Secretary of Defense Melvin Laird revealed.

Assistant Secretary Nielsen considered Mr. Fitzgerald's usefulness to the Air Force to be at an end as of January 8, 1969. Therefore, he obviously did not include Mr. Fitzgerald in his proposed reorganizations of February 26, 1969 and May 5, 1969. Mr. Nielsen's last proposal is essentially the same as the reorganization Assistant Secretary Schedler, with Secretary Seaman's approval, finally put into effect. This reorganization abolished Mr. Fitzgerald's position and led to his separation by RIF on January 5, 1970.

Mr. Schedler testified that he did not decide to abolish Mr. Fitzgerald's position until late September or early October 1969. However, Secretary Seamans and Secretary Laird came to the decision that Mr. Fitzgerald had to leave the Air Force much earlier than Mr. Schedler was willing to admit. They were busy looking for another position outside the Air Force for the appellant as early as May 1969. One of the positions under consideration was with the Fitzhugh Blue Ribbon Panel, previously discussed.

[18] Secretary Seamans denied being instructed, directed or ordered by anyone to terminate Mr. Fitzgerald. However, he

initially declined to respond to any and all questions concerning possible communications he may have had with, or any advice received from, the White House staff regarding Mr. Fitzgerald. This declination was based on the doctrines of Executive Privilege and privileged communications. Secretary Seamans was advised by this examiner (TR 499) as follows:

> "Mr. Secretary, I am without authority to order you to answer the question. If the answer to the question becomes relevant and material, all I can do is to take into consideration your refusal to answer the question."

Secretary Seamans subsequently testified that at some point in time prior to Mr. Fitzgerald's job being abolished he did receive some advice from the White House; however, he refused to discuss it any further (TR 839).

By letter dated August 2, 1973, with a copy to the agency representative, appellant's attorney submitted a copy of a January 20, 1970 internal White House memo from Alexander Butterfield to Mr. H. R. Haldeman that had just been discovered. The agency was offered but declined the opportunity to comment. This memo states:

> "You'll recall that I relayed to you my personal comments while you were at San Clemente, but let me cite them once again—partly for the record—and partly because some of you with more political horse sense than I will probably want to review the matter prior to next Monday's press conference.
>
> —Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.
>
> —Last May he slipped off alone to a meeting of the National Democratic Coalition and while there revealed to a senior AFL-CIO official (who happened to be unsympathetic) that he planned to "blow the whistle on the Air Force" by exposing to full public view that Service's "shoddy purchasing practices".

> Only a basic no-goodnik would take his official business grievances so far from normal channels. As imperfect as the Air Force and other military Services are, they very definitely do not go out of their way to waste government funds; in fact, quite to the contrary, they strive continuously (at least in spirit) to find new ways to economize. If McNamara did nothing else he made the Services more cost-conscious and introspective—so I think it is safe to say that none of their bungling is malicious . . . or even preconceived.
>
> [19]—Upon leaving the Pentagon—on his last official duty—he announced to the press that "contrary to recent newspaper reports" he was not going to work for the Federal Government, but instead, was going to "work on the outside" as a private consultant.
>
> We should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part.
>
> We owe "first choice on Fitzgerald" to Proxmire and others who tried so hard to make him a hero."

The information contained in the memo concerning Mr. Fitzgerald's May 1969 statements at a meeting of the National Democratic Coalition had not previously come to light in this proceeding. In the light of Secretary Seaman's refusal to furnish testimony on conversations he had with, or advice he received from the White House Staff; and our notification to the Secretary (TR 499), quoted supra, we must conclude and do hereby find that Mr. Fitzgerald's May 1969 statements were the subject of Secretary Seaman's discussion with the White House staff. We must also conclude and do hereby find that these statements by Mr. Fitzgerald were one of the underlying reasons for the decision to abolish Mr. Fitzgerald's position and to terminate his employment with the Air Force.

The "Lang Memo" previously quoted, set out three (3) methods by which the agency could terminate Mr. Fitzgerald.

Method No. 3. was not recommended. Method No. 1. was to follow adverse action procedures with all of the requirements for specified charges, opportunity to reply and appeals. Method No. 2., which the agency subsequently followed, was to abolish Mr. Fitzgerald's position and since his assignment rights would only be to Excepted Service positions, he would end up being separated. Secretary Seamans and Assistant Secretary Schedler both saw the "Lang Memo" prior to Mr. Fitzgerald's position being abolished.

Our findings, supra, reveal many instances of dissatisfaction with Mr. Fitzgerald. In addition, Secretary Seamans testified (TR 964) that:

> "It is obvious from the testimony these past three days that I was not satisfied with Mr. Fitzgerald's performance. I made no pretense that I was."

After carefully reviewing the complete appellate record and in view of all of the foregoing analysis, findings and conclusions, we find that the agency's decision to abolish Mr. Fitzgerald's position and to include him in the Project 703 reduction-in-force improperly resulted from and was influenced [20] by reasons purely personal to the appellant; and was for the purpose of terminating his employment with the Air Force.

Secretary Seamans, in discussing his dissatisfaction with Mr. Fitzgerald also stated (TR 964):

> "But at the same time it does not give Mr. Fitzgerald immunity against having his job abolished, and the abolition of the job for improvement in our management capability was a separate and distinct step, or action."

It is true that an undesirable, inadequate or unsatisfactory employee is not immune from having his position abolished. However, the decision to abolish that employee's, or any employee's, position must be based solely on reasons not personal to the employee. These employees must be removed from their positions by other means because the spirit, intent, and letter of the Commission's regulations require that the reduction-in-force system be used for reasons that are not

personal to the employees affected. The more an employee is deserving of being fired, the more inappropriate it is to abolish his position and separate him by reduction-in-force.

In the case at hand, where we have found from the evidence of record that the decision to abolish Mr. Fitzgerald's position and to separate him by reduction-in-force was influenced by, and resulted from, reasons that were personal to the appellant; and where the appellant was an employee entitled to the adverse action procedures set forth in Part 752-B of the Civil Service regulations; we find his separation by reduction-in-force to be improper, inappropriate and contrary to the spirit, intent, and letter of the Commission's regulations.

RECOMMENDATION

Accordingly, we recommend that Mr. Fitzgerald be restored retroactively to January 5, 1970 to the position from which he was improperly separated, or to any other position of like grade, salary and tenure in the Excepted Service and with the same or similar qualifications requirements as his former position. Please furnish this office with a copy of the SF-50 accomplishing the recommended corrective action.

The appellant requested an award of damages, costs and reasonable attorneys' fees. The applicable statutes, Executive Orders and Commission regulations do not provide for any awards of damages, costs, or attorneys' fees by the Commission in a decision on an appeal. Therefore, the appellant's request in this regard must be denied. It should be noted that during the course of the proceeding the appellant's attorneys contended that they had volunteered their services and were performing without charge.

[21] The appellant has also requested reimbursement for the compensation he would have received if he had not been terminated.

Retroactive corrective action as ordered by the Commission carries with it an entitlement to back pay in accordance with the provisions of the "Back Pay Act". However, the

Commission does not determine the amount of the back pay entitlement, if any.

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U.S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U.S. Civil Service Commission
Washington, D.C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar day time limitation.

/s/ Herman D. Staiman

.....

Herman D. Staiman, Chief
Appeals Examining Office

Excerpts From The Deposition of Patrick J. Buchanan (R. 414) [pp. 14-19, 41-50]

[14] Q. Do you have any recollection of communicating with the President anything having to do with Fitzgerald before November or December of 1969? A. No.

Q. Now, focusing in on November and December of '69, what recollection do you have concerning being aware of Mr. Fitzgerald and any situation that arose with him and his employment at the Department of Defense? A. Well, Fitzgerald, I have to assume from what we did, had become a public issue. Clark Mollenhoff—his departure from the Department of Defense or whatever it was—anyhow, Clark Mollenhoff came down to my office.

I had sent out a memorandum to the Department of Defense asking for responses to questions which were going to —likely to come up at a Presidential press conference about A. Ernest Fitzgerald, and they sent back a response or a number of responses which I then collated and got together and made into a single answer.

At the same time, Clark Mollenhoff came down to my office and talked to me about the matter, and I sent a subsequent—which I have seen subsequently since then—I sent a memorandum to the President suggesting that he handle the [15]question, if it came up, in an altogether different way.

Q. Now, the memos you say you have seen since then, was that memo included among the memos that I showed you this morning before this deposition? A. Yes, I believe it was.

Q. I am having those xeroxed, and as soon as they're done they'll be in here and we'll go through them. I'm going to try to cover the general turf to save time. A. Before I saw the memo, if somebody had asked me before I'd seen the memo I sent, I would say Mollenhoff and I sought to get the Administration to find Fitzgerald a new job at equal pay and to make some sort of

commendatory statement about the job he had done on the cost overruns of the C-5A, because I remember working with Clark Mollenhoff on the issue in the White House, and that was before I saw the memoranda.

Q. Now, what was the tenure of the position taken by Mr. Mollenhoff concerning the pros or cons or the Fitzgerald situation vis-a-vis the wisdom of the White House backing Fitzgerald versus the Department of Defense?

MR. KEENEY: Objection as to the form.

THE WITNESS: Pardon?

MR. KEENEY: Objection as to form.

[16] BY MR. MORTENSON:

Q. He's registering his objection. A. What was Mollenhoff's position?

Q. Yes, what was the tenure concerning the Fitzgerald situation? A. My recollection is this: Mollenhoff had looked into the situation much more closely than I had. I had not. And Mollenhoff came to me and said and indicated that what we had here was a bureaucratic battle over at Defense, that Fitzgerald was being canned because of his battle. There was a certain institutional loyalty over there to—that Fitzgerald had been an embarrassment, and now the issue had been made public. And now the Nixon Administration, in particular the White House, were being blamed for this thing and that the President had a golden opportunity at the press conference not only to correct a seeming injustice, but also for us to take—to get political credit for doing what we ought to have done.

Fitzgerald had been no embarrassment to us, the C-5A was under the Johnson Administration, so that's precisely the position we recommended to Mr. Nixon.

Q. Now, in your communications with Mr. Mollenhoff, did [17] he at any time ever use any words to the effect—communicating to you the impression that the White House's position with regard to Mr. Fitzgerald involved a criminal conspiracy of any sorts, a cover-up?

MR. KEENEY: Objection, leading question.

MR. MORTENSON: Let me finish.

BY MR. MORTENSON:

Q. —a cover-up, an obstruction of justice or a retaliation of a witness before Congress?

MR. KEENEY: Same objection; leading question.

THE WITNESS: As for the—no, I mean, I have never —and I know Clark Mollenhoff well, and certainly not in 1969 there was no conceivable idea that there was anything criminal involved.

Some individual had been fired over at Defense or removed and it had become an embarrassment to the Administration, and we, in the White House, were catching blame. And it seemed to be something that was really not our problem; it was their problem over there.

And even in '73 and I know Clark Mollenhoff well—and he called me and used to talk to me a good deal, even during the Watergate days when he was outside. But he never [18] to my recollection in the matter of Mr. Fitzgerald ever used the term or suggested something had been done that was criminal.

I mean, if you ask me did Mollenhoff suggest that the matter had been badly screwed up, I would say yes, but the idea that anything illegal had taken place or we were involved in something illegal, no.

Q. Now, did you communicate in some way or another your views and/or the views of Mr. Mollenhoff to the President? A. Oh, yes. Mollenhoff came down to me and I sent a memorandum to the President as part of his briefing book, giving a suggested response which contradicted or which was at odds, you might say, with what the official response from the Department of Defense was.

I felt the White House should take a stand, in other words, should overrule the Department of Defense and the President should himself overrule and should get credit for overruling the Department of Defense on the whole matter of Mr. Fitzgerald

by, as I think I suggested, removing him from the shop he was in. Obviously there was bad blood there. As I say, making some commendatory statement about the job he had done and finding him a new and comparable position.

[19] In other words, the notion that in those days whistleblowers were very much in vogue and the very fact that Mr. Nixon, the President, had not only commended one, but had either promoted him or given him a job of comparable responsibility would have made the Nixon Administration and the President look good; and it was the right thing to do; and it would have been a benefit and the only one whose noses would have been out of joint would have been these people over there, nameless, faceless individuals over there who apparently had something against Mr. Fitzgerald because of what he reported on the C-5A.

But let me say in terms of who's involved in the Department of Defense and what condition Mr. Fitzgerald was in and whether these were bureaucratees he was involved in, I don't know. I relied on Mollenhoff for that.

Q. Now, with regard to the briefing books, did you, after the press conferences, as a matter of course get the briefing books back into your possession at some time? A. Right, it came a time, I forget exactly when during the Nixon Administration, when Nixon directed that all the briefing books be sent back to me, and I had a file cabinet which contained all the briefing books. And there was a

* * *

[41] date of this, because the—no, wait a minute. This is consistent because we're still asking for information on the Fitzgerald matter, I think, in that earlier memo.

This appears to be the Department of Defense's responses which I told Haldeman which would be coming in book number II, which I used as the basis for the Department of Defense response, to to speak, to the Fitzgerald question.

Can I take a look at that first one again? Where is the—have you already given me or do we have a—no, we don't. Okay.

Anything else?

Q. Let me move to Defendant's 107(n). (The potocopied document titled A. Ernest Fitzgerald, one page, was marked for identification as Defendant's Exhibit 107(n) and is attached to the court copy of this deposition.) THE WITNESS: Okay.

BY MR. MORTENSON:

Q. Before I ask you any questions on it, let me also place before you 108(n). [The photocopied document titled A. Ernest Fitzgerald, coded F-1 at the bottom, was marked for identification as Defendant's Exhibit 108(n) and is attached to the court copy of this deposition.]

[42] BY MR. MORTENSON:

Q. Let me represent to you that I don't personally know the source of the location of this document, and so I'm going to ask you blindly, do you recognize this document, what the date of it would have been or is or anything about it? A. This appears to be the answer, requested answer to the A. Ernest Fitzgerald question which I would have prepared based on the materials sent to me by Colonel Bolt.

In other words, I would never send Nixon five straight questions on A. Ernest Fitzgerald; I would take all the material, put it into one question.

Probably the ink coloring on the first one, 107(n) is probably mine to indicate that from the materials Defense sent me that Nixon should emphasize the point that the revelations dealt with McNamara, not Laird.

108(n) seems to inciate—these are Nixon's speeches I believe, but you can check those from the briefing book, after Nixon returned it.

This looks like, as I say, the question as it was sent to Nixon. This looks like the question after Nixon had—makes his own markings and as I say, makes a number of [43] markings. That looks like the first response that Nixon gave.

Now, have we got—

Q. Let me, while you're—then show you the next document, 109(n). [The photocopied document, one page, dated

December 8, 1969 Memorandum to the President from Patrick J. Buchanan was marked for identification as Defendant's Exhibit 109(n) and is attached to the court copy of this deposition.]

MR. RAVEN-HANSEN: For the record, this has also been previously marked. I think it was Plaintiff's Exhibit 106 marked during Mr. Mixon's deposition.

BY MR. MORTENSON:

Q. If you can look at this and tell me whether you can identify it and whether it puts in context the documents I gave you just before it? A. All right, okay. Now, this is what it seems to be: We sent the old man a memo on the Fitzgerald matter. I sent my memorandum to him suggesting what he say.

In comes the Defense Department stuff. This is the December 8th did you say was the date of the press conference?

[44] Q. Yes.

MR. KEENEY: Yes.

THE WITNESS: We let the President know what Defense has said in effect, but we disagree with Defense's position and we reiterate that we disagree with that position and from a public relations standpoint, is the term used here, we suggest, once again, that the President handle the question if it comes up in the way that we had recommended and that we should just tell Secretary Laird that if he has to see it that's what we're going to do.

BY MR. MORTENSON:

Q. Let me show you the next document, which is Defendant's Exhibit 110(n). [The photocopied document, one page, on White House letterhead dated December 5, 1969, Memorandum for H. R. Haldeman was marked for identification as Defendant's Exhibit 110(n) and is attached to the court copy of this deposition.]

BY MR. MORTENSON:

Q. Do you recognize the— A. The scrawl?

Q. —handwriting? [45] A. Yes, that clearly seems to be Mr. Nixon's handwriting. These are the additions to the—this

is, yes, this is one addition to the briefing book, right, that's Mr. Nixon's writing, "Fitzgerald reinstated".

It appears that he's, he is, if you take a look at the memorandum attached, the underlining could be that of Mr. Nixon himself because it appears to be done in his pen, when he says "direct" that appears to be Mr. Nixon's underlining, as I say.

It seems to me that he has taken our counsel because A, he has underlined the word "direct" which he would do, "I have decided to direct—", and then he has said, "Fitzgerald reinstated" on the cover of the—on the memorandum, which is in his briefing book. So he seems to be prepared to say at the press conference that Mr. Fitzgerald has been reinstated or something to that effect.

It seems like we had won the battle, in other words.

Q. Now, when you say that, that it seems that that's what he has done, do you base that solely upon the language that is stated there, or is there built into that interpretation your experience in dealing with him in the White House prior? [46] A. Yes, as I mentioned, if you get something like—a note like this, you can go through his briefing books and he will outline or note precisely what he's going to say. If you go through the briefing books and then compare those with the transcript of the press conference itself, you can see Nixon making each of these points that are written right there in the briefing book.

The very fact that I believe this is his underlining of the word "direct" that came out of the briefing book, it can only be his underlining, because he and I are the only ones that dealt with the briefing book itself, and if I had underlined it, it would be on my typewriting. So he had underlined the word "direct" and his writing is on the cover.

"Churchill quotes." He probably sought to ask me for some Churchill quote for some other question which he would like to have included in his response. My guess is it's not to the Ernest Fitzgerald matter. I don't think he was going to compare him with Churchill.

(Laughter.)

MR. RAVEN-HANSEN: Off the record.

(Discussion held off the record.)

[47] BY MR. MORTENSON:

Q. While we're going through documents, let me show you this next one that's in front of me, which would be Defendant's 111(n). [The photocopied document, two pages stapled, on White House letterhead dated January 21, 1970 marked "Confidential" was marked for identification as Defendant's Exhibit 111(n) and is attached to the court copy of this deposition.]

BY MR. MORTENSON:

Q. Do you recall, Mr. Buchanan, ever seeing this document before? A. As recollection, no, I don't.

Is this a two-page job? No.

Q. Let me place in front of you 112(n). [The photocopied document, two pages stapled, on White House letterhead dated December 5, 1969, Memorandum for the President from Clark Mollenhoff Subject: The Fitzgerald Case was marked for identification as Defendant's Exhibit 112(n) for identification and is attached to the court copy of this deposition.]

[48] BY MR. MORTENSON:

Q. Let me ask, do you recall this being a document that I showed you this morning before the deposition began? A Yes, I do. This, again, looks like—let me see. Again, looks like Mr. Nixon's handwriting on page 2, and also his form of underlining on page 1 with his pen.

Let me see. Let me read this. Obviously, he's not going to issue, you know, a major statement from the White House.

It's got to be a suggested position with regard to the upcoming press conference. It appears to be that. He looked at—maybe what this looks like is I had this put in my briefing books, you know.

Q. The "briefing book this afternoon" is the handwriting you're reading, of the handwriting in the right-hand column on page 2 of the document? A. Right.

Q. Is that the handwriting which you attribute to President Nixon on— A. Right, not only the handwriting, but the underlining as well. Let's see.

The very fact that he would circle something like [49] that would mean that this is the part of the memo that he wants stuck in his mind.

Q. Mr. Buchanan, why are you capable to identify Mr. Nixon's handwriting? A. Because I've seen—I've worked with him for eight and a half years. I worked with Mr. Nixon for eight and a half years. His scribblings—I have got personal letters from him in my library. If you go through the files of the Presidential briefing books you'll find Nixon's handwriting all over them.

You can compare the two, because as I say, once the briefing book itself went from me, the only one who had it was Richard Nixon. It went directly into him. It did not go to—the first copy—that copy did not go to anyone else; a xeroxed copy of the books would go to the different individuals.

Q. Give that to her again. A. The briefing book would go straight to the President. I would either have it on his night table or have it delivered down to him personally when he wanted it. He would get the book himself just like he would get the original news summary, and others, Ziegler, Erlichman, Harlow, would [50] get clean xeroxed copies.

So the only one that would have written on the briefing book would be Richard Nixon.

Q. You said that you traveled with Mr. Laird and you know him well and know him well today; is that correct? A. Yes, I know Mr. Laird.

Q. And you worked with Mr. Nixon, you said, for approximately eight and a half years? A. Right, I was with him since January '66 and was his only assistant, I think, for fourteen months.

Q. Do you, of your own personel knowledge, know whether Mr. Nixon ever directed, at any time, any time member of his staff to see to it that Mr. Fitzgerald was placed in

a position in the Bureau of the Budget? A. I don't have any knowledge of that, no.

Q. All right. Now, based upon your knowledge of Mr. Laird and Mr. Nixon, if Mr. Nixon directed that Mr. Fitzgerald be placed in a position in the Bureau of the Budget, do you know whether that would be consistent or inconsistent with the relationship between Mr. Nixon and Mr. Laird in terms of Mr. Nixon's unwillingness to override or to direct Mr. Laird in personnel matters at the DOD?

* * *

Excerpts From The
Deposition of Alexander P. Butterfield (R. 42)
[pp. 127-28, 130, 143-44, 147-48]

[127] A. No, it was not. But as I said, my duties were not specific, but any member of the White House staff could be asked anything to do, almost anything. The scope of one's duties, I think, were surprisingly broad.

Q. Yes.

Now, isn't it a fact, sir, that when you wrote this memorandum you were outside of your field of authority entirely?

MR. KELSON: I object to the question.

THE WITNESS: I would say not at all.

MR. BODNER: (Resuming)

Q. Not at all? A. Not at all.

Q. You're saying now that when you wrote this memorandum you were not acting out of your field entirely?

MR. KELSON: Entirely?

MR. BODNER: Yes.

MR. KELSON: I object to the question again.

MR. BODNER: (Resuming)

Q. Is that right? A. I would say no field was outside of my authority. I don't say that by way of making my job sound important, but I dealt in so many different areas—I couldn't begin to name them. I attended to so many separate functions. I was [128] a senior official on the White House staff, a designated member of the senior staff, and I don't believe that any subject, especially one which was of interest to any of my superiors—Mr. Haldeman, the President or anyone else—was outside the realm of my authority.

Q. Did you ever tell anyone at any time that when you wrote that memorandum it wasn't your your role at all? A. It wasn't my role to write this? I don't recall if I did, and if I did I certainly was in error. I don't recall telling anyone.

Q. Is that an untruth if you said it? A. It wasn't an untruth. It wasn't an intentional untruth. It was either an error on the person's part with regard to interpretation—

Q. Do you deny saying it? A. I know not to deny saying anything. During my 38 hours of interrogation on this Watergate business, I've learned never to be positive about anything I've done. So if I said it, it was wholly false.

Q. Would it also be false if you said that when you wrote that memorandum you were out of that field entirely? A. That would be wholly false if I said that. You see, nothing was out of my field.

* * *

[130] Q. Was it part of your official duties to write this memorandum? A. Very definitely, very definitely.

Q. Did anybody— A. It was part of my official duties to express my opinion on a subject of interest to any of my superiors or any of my colleagues. But this particular memorandum, as I'm sure you see, was prompted by an enquiry from the press office.

Q. Yes, sir. A. Otherwise, it probably would not have been written.

Q. You weren't working for anyone in the press office? A. No, I was not.

Q. The only person you were working for was Mr. Haldeman before the change, and then the President of the United States, Richard Nixon? A. That's correct; and always for Mr. Haldeman.

Q. Yes, sir. A. And any senior member of the White House staff. I felt that I worked sort of indirectly for Ehrlichman, Kissinger and others if they were to task me with some chore.

Q. But you weren't working for Alan Woods, were you? A. No, but Alan Woods enquired as to, if I may refer to the memorandum and as I say I had not read this memorandum

* * *

[143] never had the responsibility, did you, sir, for determining whether persons such as Mr. Fitzgerald in the Air Force should remain in his position or be terminated from his position, is that right?

THE WITNESS: I never had a responsibility for determining whether or not Mr. Fitzgerald should remain with the Department of the Air Force. That is correct.

MR. BODNER: (Resuming)

Q. Yes, sir. But you did write this memorandum expressing the view, as you stated it in the memorandum of July 20th, 1970—January 20th, 1970, that "He should bleed for a while", is that right, sir? A. I wrote this memorandum of January 20, 1970, entirely on my own, feeling it my duty to express, again in writing—I had already mentioned it once to Mr. Haldeman orally earlier, and I can't remember on what occasion I did that. I probably wouldn't have expressed it in writing at all if I hadn't been prompted by Mr. Woods' enquiry of an Administration position; and I wrote it entirely on my own. And the expression "let him bleed" as I'm sure everyone knows, is in retrospect, a very poor choice of words; but it is expressive of what I meant—let him cry, let him suffer, for at least a while. And that is precisely what I did mean. [144] As I said before, I am not at all ashamed of this memorandum. It is what I thought at the time based on the information that I got from that one meeting with Mr. Haldeman and others sometime before, some few weeks before.

Q. And you not only wrote that memorandum to Mr. Haldeman, but you sent it to six of the most important members of the White House staff. Isn't that true, sir? A. That is true, all of whom would be giving Mr. Haldeman inputs or all of whom had something to do with the development of an Administration position on a subject of this nature; and I would be remiss, I think, if I did not let them know what I knew—also my opinion—so they could either elaborate on what I knew or contradict what I knew so that Mr. Haldeman could get the benefit of everyone's views on the subject if he had the responsibility for developing a position or being the final authority with regard to establishing a position or recommending a position to the President.

Q. And you knew, did you not, sir, that Mr. Fitzgerald's job and future career in the Air Force was at stake?

MR. KELSON: Objection. That question is misstating facts previously in the record.

MR. BODNER: Come on. Your objection is noted.

* * *

[147] not be done.

A. For a while, at least.

Q. Yes, sir. A. Yes, I certainly would admit to that.

Q. As you expressed it in the memorandum, you thought "He should bleed for a while" or suffer for a while, because in your view he had done something improper when he was with the Air Force? A. That is correct.

Q. And as I read your memorandum, you believed that he had acted outside of channels. Is that right? A. Yes, sir. That is correct. In my view he had evidenced some disloyalty to his superiors, based on the information that I gleaned from that very brief resumé of his case in that meeting.

Q. Yes, sir. And you not only expressed those views very strongly to Mr. Haldeman, but on your own you sent it to six of the top members of the staff at the White House who exercised very important policy-making functions?

MR. KELSON: I object to the term "on your own".

THE WITNESS: But that was very much a part of [148] writing this. It was important in my view to send this to others concerned, and I don't think I even included all of them because I am sure, my guess is that there were other people in the original Haldeman meeting, although it was not a prime issue in this meeting—it was sort of a peripheral minor item among a number of items discussed at the meeting. It was not called for this purpose; it was just something that came up. And I am sure there were others who were in that meeting and who probably should have been informed also. But I think it is as important for Dr. Kissinger to know that I am even, that I am even giving any information at all on a former Defense Department employee, as it is the principal addressee, Mr. Haldeman, and the same for Klein and Colson. I honestly believe that I would have been remiss if I hadn't given it this kind of circulation at least, because as I said earlier, Mr.

Haldeman was going to count on opinions from others, certainly not just from me, in the development of a position or in preparing the President for a possible question on the Fitzgerald matter at his forthcoming press conference which is mentioned in the memo.

MR. BODNER: (Resuming)

Q. When you sent that memorandum to Mr. Haldeman, under the "others" showing, on the second page, you fully realized,

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Excerpt From
The Deposition of
John Ehrlichman (R. 444)
[pp. 10-14]

[10] Q. Do you recall ever discussing Mr. Fitzgerald's situation, and I will use that as a shorthand term—if we need to define it, we will do so—but did you ever discuss Mr. Fitzgerald with Mr. Haldeman? A. Not that I can recall.

Q. Mr. Harlow? A. No, I don't recall discussing it with him.

Q. Mr. Butterfield? A. No.

Q. Mr. Nixon? A. Yes.

Q. Now would you tell us in what context you discussed Mr. Fitzgerald with Mr. Nixon? A. There was a press conference at which Sarah McClendon asked a question about Fitzgerald and some other people—or other transaction, and there was a conversation—let me see if I can get this right.

There was a conversation at a budget session, I believe following that press conference, about the advisability of bringing Fitzgerald into the White House or the Bureau of the Budget, and I was either a participant or at least an auditor of that conversation with the President.

Q. Do you have any independent recollection as to what went on at that discussion? [11] A. I have a refreshed recollection based on my notes of that session, and a subsequent memo that I wrote to Mollenhoff.

MR. MORTENSON: Can I ask that the documents that were previously given to Mr. Ehrlichman be given to him again?

BY MR. MORTENSON:

Q. Could you pull out and have the reporter mark the document that is your notes which refreshed your recollection?

Off the record.

(Discussion off the record.) (Defendant's Exhibits Nos. 134-162 were marked for identification.)

BY MR. MORTENSON:

Q. Mr. Ehrlichman, the reporter has just marked defendant's exhibits 134 through 162.

My question is, having watched that process take place, are those the documents I sent you in connection with your appearance here today? A. Yes.

Q. And have you at some point or other reviewed each of those documents? A. Yes.

Q. To make sure we are covered on this, during our session before the deposition I showed you one additional document; do you recall what that document was? [12] A. It was something that I had not seen before. I have forgotten what it was.

MR. MORTENSON: Let me have the reporter mark this. (Defendant's Exhibit No. 163 was marked for identification.)

THE WITNESS: Yes, that is the transmittal for a press briefing.

BY MR. MORTENSON:

Q. So defendant's 163 was also shown you in connection with our session?

A. That is right.

Q. Now to get back on track would you pull out the set of documents you have seen prior to the deposition the one you referred to as your notes with the meeting of the President? A There are four of them, actually.

Q. Would you give us the numbers? A 148, 149, 150, and 151.

Q. Would you tell us briefly in descriptive form what each of those is? A The first three, 148, 149 and 150, are my handwritten notes from meetings with the President and others. 151 is a copy of a memo that I wrote Clark Mollenhoff on December 30, 1969.

Q. Based on your refreshed recollection, are you aware [13] of any effort on Mr. Nixon's part to cause Mr. Fitzgerald's employment at the Bureau of the Budget? A. Yes.

Q. Can you tell me what your refreshed recollection is in that regard? A. Yes.

Apparently, he decided to put Fitzgerald into the Bureau of the Budget, and it was discussed on or before the 11th of December, 1969. Then again, he discussed it with the Director and the Deputy Director, and Assistant Director of the Bureau of the Budget in my presence on the 17th of December, and then again with the Director and Deputy Director on the 23rd of December, at which time he decided not to do it.

Q. Do you recall anything that Mr. Mayo, the Director of the Bureau of the Budget, had to say about Mr. Fitzgerald's employment at the BOB? A. Not specifically. But the thrust of his position was that he didn't want him.

Q. What did Mr. Nixon say, if you can recall? A. He decided to go along with Mr. Mayo. That was in the ultimate meeting on the 23rd.

Q. Does defendant's exhibit 151, the memo to Mr. Mollenhoff, is that what prompted that memo to be sent? A. Well, that was communicating the President's [14] decision to Mr. Mollenhoff, and it was prompted by the fact that I wanted to get Mollenhoff off my back.

Q. In the discussions that are reflected in your notes, do you recall Mr. Nixon ever speaking negatively toward Mr. Fitzgerald? A. No, I don't.

Q. Do you recall him expressing any animosity toward Mr. Fitzgerald? A. Not at this time, no.

Q. Did you get any impression that the position that was going to be—that a Bureau of the Budget position was to be some sort of deadend job or something with not much responsibility?

MR. VON KANN: I would like to note that there has been quite a bit of leading, and I have been prepared to tolerate it to expedite things. But I think that is one leading question too many.

BY MR. MORTENSON:

Q. Moving on, after you wrote the memo to Mr. Mollenhoff indicating the President's ultimate decision with regard to

Mr. Fitzgerald, do you have any recollection of any contact having to do with Mr. Fitzgerald prior to, say, 1973? A. No.

Q. Apart from these discussions reflected in your notes, do you have any recollection of any conversation you had in

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Excerpt From
The Deposition of
Alexander M. Haig (R. 470)
[p.36]

[36] Q. Did Mr. Butterfield submit memoranda from time to time to you in your official capacity at the National Security Council concerning policy recommendations or recommendations for actions or inactions by the Administration? A. Not very often. As I recall in that period, in that area, Butterfield's responsibilities involved White House security and procedural matters. I don't recall his being a vehicle for any substantive matters. He was highly administrative in character, getting the papers together for the President, the deadlines, internal security.

Q So if I understand you correctly, his role, as you understood it, from having known him and talking to him, did not involve sending substantive memoranda to your office at the National Security Council—substantive as opposed to—A As a rule, no. But there could have been exceptions. I don't recall any.

Q Now, Mr. Landman showed you a memorandum previously about Mr. Butterfield, and I think he mentioned there was no indication on it that you would have seen it.

Let me show you Plaintiffs Exhibit 237. I note the second page of that same memorandum appears—or a version. I will ask whether reviewing the memorandum at pages 2 and 3 of Plaintiff's Exhibit 237—You might want to read the first page of the exhibit. A You want me to read—?

* * *

Excerpt From the
Deposition of Harry R. Haldeman (R. 418)
Taken on Feb. 7, 1980 [pp. 4-9]

[4] HARRY R. HALDEMAN, called as a witness, and being first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION

BY MR. LANDMAN: Q. Mr. Haldeman, would you please state your full name for the record? A. Harry R. Haldeman, H A L D E M A N.

Q. I'd like to show you Defendant's Exhibit 143, which has previously been marked in this case.

MR. VON KANN: Mark, I'd just like to establish on the record: Are you representing Mr. Haldeman at this deposition?

MR. LANDMAN: Yes, I am.

MR. VON KANN: For reasons which I have previously stated, which I will not belabor, we object to that representation.

MR. LANDMAN: Fine.

THE WITNESS: Okay.

BY MR. LANDMAN: Q. Are you able to identify this document? A. Yes.

Q. Okay. What is it? A. It's a page of handwritten notes in my handwriting, dated 12-9, no year indicated.

Q. Based on, looking at these notes, do you have [5] any idea of when, during the course of a day, on what occasion you would write these notes?

MR. VON KANN: On what occasion he would write these notes or did write these notes? You mean notes of this kind, or when did he specifically exhibit write Defendant's Exhibit 143?

BY MR. LANDMAN: Q. Do you have a specific recollection of writing this document, Defendant's Exhibit 143? A. No.

Q. But based on your practice and procedure in the White House, can you reconstruct when you would have written these

notes? A. These are in the form, and in looking at the overall content, I would say they fit the form of notes that I customarily made in all meetings with the President.

Q. Referring to the very last entry in the notes, I believe there is a check mark. And without representing what it says, it might be an E, if you could read that? A. There is a check mark and an E in the margin. And the note says, "Schlessinger—put Fitzgerald in budget"—then on the next line—"on nondefense problems."

Q. Other than what is here in this note, do you have any independent recollection as to what that means? A. Not as of that time. I do in the context that—of this case.

[6] Q. Okay. What does that indicate? A. It's an instruction, first of all, to me, to instruct Ehrlichman to instruct Schlessinger to find a position for Fitzgerald in the Budget Bureau working on nondefense problems, an assignment in an area other than defense.

Q. And who gave you that instruction? A. The President.

Q. I'd like to show you the next document, which I don't believe has been marked. What document are we on?

MR. MORTENSON: Off the record.

(Off-the-record discussion.)

MR. LANDMAN: Would you please mark this as Defendant's Exhibit 181.

(Defendant's Exhibit 181 marked for identification.)

BY MR. LANDMAN: Q. Are you able to identify Defendant's Exhibit 181? A. Yes.

Q. What is it? A. It's a note in my handwriting—

MR. VON KANN: Sorry to interrupt you, sir, but so we are clear: When you asked this witness to identify, I take it you were asking him if he has some recollection of what the document is? You are not asking him to look at it as any fresh intelligent human being would come along and [7] perceive that it purports to be from X to Y dated such and such?

MR. LANDMAN: That's correct.

MR. VON KANN: You are asking him if he has a recollection about this particular document?

MR. LANDMAN: Yes.

MR. VON KANN: Go ahead.

THE WITNESS: In that context, I don't have a recollection of the document at the time it was created. I am able, out of my knowledge of my own writing and actions, to identify what this is.

BY MR. LANDMAN: Q. Okay. Would you please do so? A. It's a handwritten note on White House memo pad form identified as confidential, dated December 9, to Mollenhoff, from me, identified as a F Y I memorandum.

Q. F Y I meaning? A. For your information.

Q. And what does it say? A. It says. "The P," which means president, "has asked Mayo to bring Fitzgerald into the Budget Bureau to work in nondefense areas." And it's signed H, which is my initial.

Q. I'd like to show you what's previously been marked as Defendant's Exhibit 146. Would you please identify this document? A. This is another page of handwritten notes in my handwriting, from a meeting with the President. It's dated [8] 12-18.

Q. And referring to the third entry on that document, would you please read what that says? A. There is an L and a check mark in the margin, and the item says, "Fitzpatrick at budget (sic)," and there's an arrow pointing down, and then a line that says, "Z, call in big broad and tell her he has a job." On the next line it says, "or E," and under broad there's a slant line and the name Sarah McClendon.

Q. And these notes would have been written when you were in a meeting with the President? A. Yes, using the President's terminology.

Q. Okay. A. I'm not going to take on Sarah McClendon.

Q. And—

MR. MORTENSON: Off the record.

(Off-the-record discussion.)

BY MR. LANDMAN: Q. Would you please state what the President is instructing you to do?

MR. VON KANN: Wait a minute. I object if you are asking Mr. Haldeman to tell you what was in Mr. Richard Nixon's mind on 12-18 of some year when he uttered these words about the big broad. If you are asking Mr. Haldeman to tell you what he perceived his instruction to come from Mr. Nixon, I think that's a fair question.

BY MR. LANDMAN: Q. What did Mr. Nixon tell you to [9] do as reflected in Defendant's Exhibit 146, the third entry? A. Based on this, the subject is Fitzpatrick at the budget, at budget, which in the context of the earlier material we have looked at would mean the job for Fitzpatrick at budget (sic). And the instruction is "Z," which would be Ziegler, "call in Sarah McClendon," a newspaper reporter, "and tell her he," Fitzpatrick (sic) "has a job," and the "or E," would mean or Ehrlichman. In other words, I could call in Ziegler or Ehrlichman and tell one or the other to tell Sarah McClendon.

Q. And what does the L indicate with the check mark? A. L refers to Larry Higby, my assistant.

Q. And the check mark? A. And the check mark means that I have done this. What that indicates is that I have told Higby to carry out this instruction.

Q. Okay. Do you have any recollection that there was ever an effort to get anyone by the name of Fitzpatrick a job at the Bureau of the Budget? A. No.

Q. Does this refresh your recollection that there was an effort to get Mr. Fitzgerald a job at the Bureau of the Budget? A. Yes.

Q. I'd like to show you what's previously been

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Excerpts From
The Deposition Of
Bryce N. Harlow (R. 392)
[pp. 58, 60, 173, 176, 183-86, 189-90]

[58] occurred at a so-called Prayer Breakfast at the White House? A No, sir, I don't believe there were Prayer Breakfasts at the White House. I think it was quite possible it was a breakfast in place of a lunch. It was a Congressional meal, I do remember that. I was in charge of it, high rank with the President and a group of Congressmen. It may have been a breakfast instead of a luncheon, I don't know that for sure. But, it was a Congressional meal that I had arranged with the President and a large group of Congressmen. The State Dining Room was filled up with people and the breakfast, lunch, the meal was in progress and I had to . . . as I remember, I had to leave the room to talk with the secretary, because he suggested he wanted to talk to me. I may be mistaken on that. They may have just adjourned, I don't recall for sure. I do know that it was an embarrassment to me, the way the secretary didn't realize in that I was charged with this affair, he was intruding on me at this time to talk about something and I was worrying about the President. I was worrying about my Congressional charges to make sure this worked right and that's the reason I remember it actually because of my feeling . . . "I mustn't be diverted this way at these breakfasts" or luncheons, or whatever it was, this meal that I put on because I've got to look after these people. That's the only real reason I remember, I think, is because I made note to myself that I mustn't let this kind of thing happen at these meals or I'll get in trouble. That's really . . . and that's all I remember about it, actually. I don't remember what we even talked about except it was

* * *

[60] Fitzgerald?

A. I just don't remember the discussion. He was talking to me about this individual in the Air Force, as I remember it, and I was thinking to myself, "My God, I'm going to get into trouble over here in the corner whether my charges adjourn or

whether my charges talk or whatever they're doing," and I'm sorry that's the case, but that's the case. Q. Let me see if I can refresh your recollection at all, sir. With respect, first for a moment, what is listed as a May 9 phone conversation. A. Yes.

Q. Does it refresh your recollection that at some point prior to this meal you had received a telephone call from Dr. Seamans in which he indicated to you that he had a problem with respect to an Air Force employee named Fitzgerald? A. I don't recall that at all.

Q. Let me ask you, sir, to look at Plaintiff's Exhibit 94 for a moment.

(Conference between Witness and attorney Landman)

Look, if you would, at Page 11 . . . let me say this, sir. This document was brought by Dr. Seamans to his deposition in Boston a couple of weeks ago, I've lost track of the exact date, and identified by him as a portion of a exit interview which he gave upon leaving the office of Secretary of the Air Force. He testified that he was interviewed by certain people who asked him questions about certain matters that had arisen while he was secretary of the Air Force. He discussed those matters and the questions and answers were

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[173] Q. To the extent you have any recollection did you ever come to that agreement with Mr. Nixon? A. No.

Q. Now, to the extent you have a recollection on the subject, did you ever come to an agreement with Dr. Seamans to bring about the firing of Mr. Fitzgerald in his position in the Air Force?

BY ATTORNEY von KANN:

Objection, leading and let me try to crystallize the other objection, which is that the witness having told us heretofore that he's given us the fullest extent of his recollection of conversations with Dr. Seamans and Mr. Nixon and others, the question therefore is predicated on the existence of a fact i.e.

further recollection which the witness has expressly denied. To that extent I think it's an improper question.

Q. Now, you may answer. To the extent you have a recollection, whatever that recollection is, did you ever agree with Mr. Seamans to bring about the firing of Mr. Fitzgerald? A. I have no present recollection.

Q. To the extent you have any recollection of lack of recollection, did you ever come to that agreement?

BY ATTORNEY von KANN:

Same objection. A. As I stated, I don't recall any of my discussions with Mr. Seamans. I would like to be able to go on to say this. That I knew very actively that Mr. Laird ran a very taut

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[176] BY ATTORNEY von KANN:

Same objection.

Q. Did you ever agree with Mr. Haldeman to take action to bring about either the firing or to present the reinstatement of Mr. Fitzgerald in the Air Force?

BY ATTORNEY von KANN:

Same objection. A. Not to my knowledge.

Q. Did you ever agree with anyone to take actions to cause any agency or department of the Air Force to investigate Mr. Fitzgerald?

BY ATTORNEY von KANN:

Same objection. A. Not to my knowledge.

Q. Have you ever tried to prevent Mr. Fitzgerald from gaining employment outside of the Air Force?

BY ATTORNEY von KANN:

Same objection. A. No, sir.

Q. Do you recall whether Mr. Mollenhoff when you had your discussions concerning his activities in connection with Mr. Fitzgerald, whether Mr. Mollenhoff asked you whether you had spoken to Dr. Seamans about the matter? A. I don't recall my discussions with Mr. Mollenhoff except I apparently had some.

Q. Would you take a look for me, please, at Defendants' Exhibit No. 40. A. Yes, sir.

* * *

[183] that you wanted to go in and tell the President about it. A. I recollect no specific instances of this, but it would be astonishing if it didn't occur.

Q. Now, based upon the documents which you've seen concerning the Fitzgerald matter in this case, based upon what you now know through communications with counsel or anything else concerning the Fitzgerald matter and thirdly, based upon what recollection you do have concerning Mr. Fitzgerald, how would you rank the significance of the Fitzgerald matter to the panoply of issues that you were handling in the White House in 1969?

BY ATTORNEY von KANN:

Objection, unless there's some more specificity in what you mean in terms of time devoted, in terms of political sensitivity, in terms of difficulty, in terms of legal complications, in terms of moral character. Unless there's some frame of reference given I think the question is too open ended and vague.

A. I think I have said earlier that it was a non-issue, in my judgment, at the time, not even a routine issue. The reason I said this is it relates to the question you've asked me, I guess, the size of these problems and the intensity of the White House activity people don't believe when you explain it to them and the President of the United States at this time had surrounded himself with people trying to help him with his job. They were charged with problems like a war going in Asia and the desperately serious problems of extricating America from that awful thing and with all of [184] its terrible fallout inside the

United States. It was also a cause of constant deep, deep concern. There were defense measures of the ABM that were active at the time that required a tremendous amount of attention from the White House and there were all kinds of new reform measures of the President on Capitol Hill legislative that notably included one that I tried desperately to urge him to delay on something because of the enormous controversy it would cause amongst his own friends and irritation and anger, the reorganization of the Post Office Department. And, it had the result that I predicted. There was a tremendous amount of that, all of which, of course, I devoted my time to, plus this season of every new administration, not just the Nixon Administration, no particular administration, all administrations in the early days go through a season of walking through a vat of acid and that season is the season of staffing in the Administration. Every member of Congress has an enormous number of appointees he wants to put in the new Administration who is of the President's party. He has been starved personnel-wise for the period the other party has been running the Executive Branch and so he wants the President to make some friends of his Assistant Secretaries or Secretaries or a Commissioner of this or a Commissioner of that or Head Administrator of this or Administrator of that. A number of key positions in each department. There are things going on right now with President Carter. These in the season are so intense, very intense the first nine (9) months to twelve (12) months [185] of a new Administration. So, the people dealing with Congress at that time go through a vat of acid, as I say, for that reason in that arena. That's true of every Administration, true whether it's a Larry O'Brien or a Bryce Harlow, it makes no difference. During that period there are very hard feelings, very difficult times with members of Congress for the in-power Administration, the new one, very difficult times. All of that consume issues as if you're walking around in a Bessemer furnace if you prefer that to a vat of acid all during that time. In such an arena an issue of this kind which properly belongs for administration inside the Executive Branch should be kept there and not bothered with by the White House. There is a constant tendency on the part of the administrators in the government to move their problems to the White House to have them handled

for them. There are lots of pressure for that. You spend half your time telling them to keep it to themselves and handle it themselves while you look after the President's concerns, that those are not properly there. In this kind of case, there were no such attempts, as far as I know, unless there was an attempt and not to my recollection at all by Mr. Seamans. I don't know why he would have done that because Mr. Laird above almost all of the other administrators in the Executive Branch was opposed to going to the White House for things of this kind and wanted them handled inside the Defense Department, that I know. Now, all of that combined makes me say it was a non-issue in the arena which I thought at the time and I think that's why I [186] was not concerned with it and did not recollect anything about it. I did not have time to study it. It's a very complex matter and I didn't know anything about it, didn't have time to try to find out about it and I couldn't take the ex-parte advice about it from any individual in the United States. I would have to look in it deeply in order to counsel anybody in the White House, the President expecially about it, therefore, I did not and to this very day I don't know any detail about it. It was clear off the radar.

Q. No further questions.

END OF CROSS-EXAMINATION BY
ATTORNEY MORTENSON

CROSS-EXAMINATION

BY ATTORNEY MARK S. LANDMAN:

Q. Mr. Harlow, in his deposition and without characterizing any of his testimony but words to this effect, Mr. Mollenhoff described a conversation with you and with regard to the Fitzgerald matter and he particularly noted the fact that you failed to tell him that you had earlier discussed the Fitzgerald matter with Dr. Seamans. Now, I know you don't recall the substance of those conversations with either Mr. Mollenhoff or Dr. Seamans, but I'm wondering if based on

general practice there was any reason why you did not tell Mr. Mollenhoff, even assuming that he asked you, about your communications with Dr. Seamans?

BY ATTORNEY von KANN:

Just a moment. I object on the grounds of having said you

* * *

[189] it was why would I have talked about it in the White House? I had no reason to do that.

Q. Focusing in on the first six (6) months of the Administration in 1969, would you have any ability to estimate how many phone calls you received on any given day? A. I was told at the time I was averaging four (400) hundred calls a day incoming. I didn't have time to count them, I don't know, but I would say the figure sounds easily that much to me. You could not hang up the phones in my office. They would ring constantly and there was no way to handle the calls. There were infinitely more calls than could be returned. So many calls came in the early days to me because of my background, not for any other reason but because of my background. Nobody knew the other people. They all knew me. The calls all came to me as a result. But, so many calls came that I had to have the White House carpenter repair an insert into my desk drawer into little bins and I would have my secretary arrange the calls into call slips. No. 1 bin was President and Vice-president; No. 2 bin was Cabinet Offices, No. 3 bin was leaders . . . selected leaders of Congress; No. 4 bin was sub-cabinet people; No. 5 bin senior members of Congress, committee chairmen, et cetera; No. 6 bin was leaders in America; No. 7 bin other significant governmental officials; the next bin way down there press; next bin friends, other. That was in my right-hand desk drawer and I'd come back from Capitol Hill, from the President's office or whatnot and [190] I would open that. That was always overflowing, all bins and how many calls, like leaves in the Fall. This went on for the first, oh, in that same intensity virtually without changing in the first six (6) months, at least, and then started slacking off as I was able to shift that slowly to my assistants and as I was unavailable.

Q. What recollection, if any, do you have of conversations with Mr. Butterfield with regard to Mr. Fitzgerald or the C-5A matter? A. I have no recollection of discussing it with him.

Q. I show you Defendants' Exhibit 40 and I believe you have testified somewhat about your typical practice as to seeing a document such as this. Well, you reviewed it and you have testified, I believe, it was your handwritten initials on the document. My question is that whether you can recall whether or not you dictated any type of memorandum with regard to Defendants' Exhibit 40? A. I don't think so. I don't know why I would have. I have no recollection of doing it.

Q. When you say you don't know why you would have, what do you mean? A. Well, I don't know what would necessitate it. Mr. Mollenhoff for good sufficient reasons known only to him wished to push this through me, he did so. I had to take home with me at night stacks of literature to read every night until two o'clock in the morning and this was probably amongst those and I probably read it and initialed it and moved it out. I wouldn't have had time to devote

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Excerpts From
The Deposition Of
Richard Kaufman (R. 472)
[pp. 8-9, 28]

[8] of that, witnesses. It was an important consideration. But the problem was first to decide what the general subject matter would be, what the main issues would be, and then to try to match potential witnesses with those issues.

Q. I would like to discuss now the hearings that took place in around November of 1968 at which we all know Mr. Fitzgerald testified. Now, I would like if you could to just start at the beginning and if you could describe for me how those hearings were planned, and how it was that Mr. Fitzgerald was eventually chosen to come and testify as a witness, if you can recall. A. We had had hearings in 1967 on the general subject of government contracting, including Defense contracting, and a report on those hearings had been issued by the subcommittee. I believe that report came out in early 1968 or spring of 1968, but I would want to check the date of that. Following the issuance of that report, the chairman decided that he did want to have a hearing that year on the same general subject, the report that I am referring to was very critical of the Defense Department for its management of procurement policy and the chairman wanted to look further into the areas that were touched on by that report. And he also wanted to look at some specific cases of major procurements and weapons systems so that some of the issues we had been discussing previously would be illustrated by examples of [9] current procurements. Following that general direction from the chairman, I began discussing with a very wide circle of individuals questions about Defense contracting and the management of Defense contracts and questions involving profits on Defense contracts and the costs of government contracts and ways to control those costs. The number of individuals that I talked with, as I indicated, was quite large and included people in various capacities within the government and outside the government in universities and think tanks and various other places.

Q. Was one of these people Mr. Fitzgerald? A. Yes.

Q. How did you come to decide to speak to Mr. Fitzgerald about these upcoming hearings? A. Several of the experts whom I had been discussing the subject with had mentioned Mr. Fitzgerald to me and had suggested that he would be an interesting person to talk to because of his expertise and because he had been making speeches and had written some essays on the subject that I was interested in.

Q. Had you known Mr. Fitzgerald before this gentleman suggested that you speak to him? A. No, I had not and as I say, several people had mentioned Mr. Fitzgerald.

* * *

[28] clear in my mind that he would be a very good person to include in our hearings.

Q. For what reasons did you consider him a very good person to include in the hearings? A. There were several. One was that he was an expert, he was well regarded by his peers and by people as I say who recommended that I talk with him as knowledgeable and insightful. Secondly, he had had experience in the private sector as a consultant with various major contractors before he came to the Air Force, and so he had had exposure to both sides; that is, to the contractor side and to the government side. Thirdly, he was very unbureaucratic in the sense that he was candid. He was plain spoken. You did not get a lot of the kind of gobbledygook or bureaucratese one often encounters with career civil servants, and he was very refreshing in his willingness to be critical of the government's efforts and of the problems generally of controlling the costs in major government contracts, and he did have knowledge of current programs, practices and policies and it was one of our specific objectives of his hearing to talk about current programs and current practices rather than older ones or things that had taken place years ago and were of more historical interest than current interest.

Q. Was the C-5A program one of the current programs

* * *

Excerpts from
the Deposition of
Melvin Laird (R. 455)
[pp. 15, 22]

[15] A. No.

Q. In learning about the facts of reorganization, that it would include the elimination of Mr. Fitzgerald's position, were you ever informed by anyone that the purpose of the reorganization and getting rid of that position was designed to teach Mr. Fitzgerald a lesson or retaliate or in any other way that it was prompted by his having testified about the C5A?

MR. RAVEN-HANSEN: I object to the form.

THE WITNESS: No.

BY MR. MORTENSON:

Q. Now, do you ever recall discussing Mr. Fitzgerald at anytime, with Mr. Nixon? A. No, I have no recollection of ever discussing Mr. Fitzgerald with Mr. Nixon—with President Nixon.

Q. Do you have any recollection of ever discussing Mr. Fitzgerald with Bryce Harlow or Mr. Alexander Butterfield? A. No.

MR. MORTENSON: Let me have this marked. (Defendant Laird Exhibit No. 132 was marked for identification.)

BY MR. MORTENSON:

Q. I ask you to look at it, Mr. Laird, and having done so, my question will be, whether you can identify it.

* * *

[22] testimony and for the exercise of his First Amendment rights.

The only named defendants are Mr. Nixon and Mr. Butterfield and Mr. Harlow.

My question is: Do you have any information that Mr. Nixon or Mr. Harlow or Mr. Butterfield ever took any action

adverse to Mr. Fitzgerald for the purpose of retaliating against him for having testified before Congress? A. Not as far as I am concerned.

Q. For his having exercised his First Amendment rights? A. No, I have no knowledge.

MR. RAVEN-HANSEN: Let the record show consultation between Mr. Laird's counsel in the form of Mr. Landman and Mr. Nixon's counsel.

MR. MORTENSON: Let me have this marked Laird No. 2. (Defendant Laird Exhibit No. 133 was marked for identification.)

BY MR. MORTENSON:

Q. I will not represent that those documents belong stapled together. They are stapled together for the purpose of the deposition, for convenience.

I would like you to look at that and in doing so, tell me if you can identify them? A. I can identify them.

* * *

Excerpt From The
Deposition of Robert P. Mayo (R. 460)
[pp. 3-7]

[3] ROBERT P. MAYO, the witness, having been first duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY
MR. LANDMAN:

Q. Mr. Mayo, would you state for the record your full name? A. Robert P. Mayo.

Q. What is your residence address, please? A. 302 Woodley Road, Winnetka, Illinois 60093.

Q. What is your position now? A. I am president of the Federal Reserve Bank of Chicago.

Q. What was your position in late 1969 and early 1970? A. I was the director of the U.S. Bureau of the Budget.

A. Do you know Mr. Fitzgerald, A. Ernest Fitzgerald, the plaintiff in this case? A. I have never met Mr. Fitzgerald.

Q. Have you ever heard of Mr. Fitzgerald? A. I have heard of Mr. Fitzgerald, yes.

Q. What was the source? How did you hear of Mr. [4] Fitzgerald? A. I believe I heard of him through Jim Schlesinger, who was Assistant Director of the Budget under me beginning, I believe March 1969. I may also have read press reports earlier, but my recollection is not good on that.

Q. Would you explain how it was that you heard about Mr Fitzgerald from Mr. Schlesinger, why you were discussing Mr. Fitzgerald? A. The only memory I have is merely a statement of fact by Mr. Schlesinger that a problem had come up in the administration of the Defense Department with regard to Mr. Fitzgerald.

Q. When did that discussion occur? A. I do not recall.

Q. Did you ever have any discussion in late 1969 with anyone in the White House with regard to Mr. Fitzgerald? A. Late in 1969—

Q. Specifically, in December of 1969. A. In December of '69, yes. This was a point that was brought up by President Nixon in a budget review session as an incidental point to the meeting. I believe Mr. Schlesinger was with me at the time, and my recollection is that Mr. Ehrlichman was there, too.

[5] in that conversation my recollection is that Mr. Nixon said, "Bob, I wonder if you could look at the non-defense area in the Budget Bureau to see if there would be anything that would be available for Mr. Fitzgerald."

Q. And what did you proceed to do? A. I proceeded to go back and discuss it further with Mr. Schlesinger, and to make sure that my representation to the President should include the fact that we in the Budget Bureau, being in the position of cutting a great deal in other programs, were very careful to run our own bureau in a way that was exemplary.

We had no vancies at that time, to the best of my recollection, in the top grades in the Budget Bureau, and that to me was a major consideration in suggesting to the President that I didn't think that we really had a position available for Mr. Fitzgerald.

Q. Were there any other considerations? A. Yes, there was. It had been represented to me, although I have never met Mr. Fitzgerald, that he did go directly to Capitol Hill on occasion and was providing information to a member of Congress in a way that was inconsistent with the program of the President of the United States, who, if I remember correctly, was President [6] Johnson at that particular time.

Q. And when you told the President that you were not able to take Mr. Fitzgerald on at the Bureau of the Budget, what was the President's reaction, if you can recall? A. He said, "Bob, you are absolutely right, that I don't think that there really is a place for Mr. Fitzgerald in your organization." And to my recollection, that was the end of the matter.

Q. When the President indicated that "you are absolutely right," was that in a sense that he was agreeing with your analysis or that he was not overriding your decision, if you can tell?

MR. VON KANN: Objection. Leading.

Q. You may answer. A. Well, I think he was agreeing with my analysis. I can't explore the President's mind that closely ten years afterwards, but that would be my impression.

Q. Well, did the President ever direct you or specifically order you to hire any individual at the Bureau of the Budget? A. Never.

Q. Do you recall ever discussing Mr. Fitzgerald with the President prior to that time? [7] A. I can recall no such discussion.

Q. Do you recall ever discussing Mr. Fitzgerald at any time with Bryce Harlow? A. No.

Q. Do you recall discussing Mr. Fitzgerald at any time with Alexander Butterfield? A. No.

Q. Do you know Dr. Seamans or did you know Dr. Seamans? A. Yes.

Q. What was his position in 1969? A. He was Secretary of the Air Force.

Q. Do you recall ever having a meeting with Secretary of the Air Force Seamans at any time during 1969 in the White House? A. Yes, I do. It related to the consideration of what we called the—what was it?—the blue-suit-man-in-space program, familiarly known as MOL.

Q. "MOL" standing for, if you know? A. You know, I can't recall. But it was the MOL program, and it was a program that Mr. Seamans worked very hard on in earlier years. Then he went back to GE, I believe it was—but that's not relevant anyway—and then came back as Secretary of the Air Force, and

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Excerpts From
The Deposition of
Clark R. Mollenhoff (R. 330-32)
[pp. 112-13, 186]

[112] was in this memorandum. I would have elaborated, and sure did, I elaborated both from the standpoint of a security risk and the conflicts of interest contention and to, in so many words, say, at this stage they appear to be stalling. It appears to be a bunch of crap. I would have put it in just about those terms. They should get back to me if they've got anything. Damn it, they should have been back a long while ago. It looks to me like Seamans has got a wrong situation here.

Q. Did Mr. Harlow indicate to you that you come back, you haven't heard yet, but, if you do, let me know about it?

MR. RAVEN-HANSEN: Objection. Why don't you ask him what Mr. Harlow said?

MR. MORTENSON: I am taking the position he is a hostile witness and I am taking the position I can lead him, that's why I am asking that.

THE WITNESS: I don't recall what Mr. Harlow's response was on that. In a general way, he did not argue with my facts. He expressed an interest in keeping—in being kept advised on the matter, and he was assuring me that he was taking it up and making sure that the President knew all about these things.

[113] Q. Did he indicate to you that he was getting some pressure from the Hill already on the Fitzgerald matter? A. At some point he chimed in something about there being some complaints from the Hill that were basically in line with the same position that I was taking and that they were going to have to deal with that too.

Q. Mr. Mollenhoff, getting away from the impressions that you have for just a moment, and focusing in on exactly what Mr. Harlow said, did he ever say to you, "Clark, I have spoken to the President about this" and "the President feels this way, that way or the other way"? A. He said that he had talked to the President about this, that the President was basically in

agreement; that this was a precarious situation; that the President wanted me to keep on top of it. And he would have at some point said, "you are not the only one who is raising questions about this", that they had had some communications from the Hill. At precisely what stage that took place, I am not certain.

Q. When you say "that took place", you are referring to what? A. His comments about complaints from the Hill. In the first conversation, I am sure he did not say anything

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[186] BY MR. MORTENSON:

Q. I am asking you if you know firsthand, apart from what somebody told you, that Nixon was aware of the Fitzgerald matter. A. I had been told my Harlow that he was involved in this, that he knew about it. He knew the details. I was told by Haldeman that these messages had been getting through to the President and that he was going to do something about it.

I knew that in the press conference, I knew from Buchanan that he had taken my memorandum and had produced a memorandum to the President which was a part of his briefing book, and that he had read the briefing book.

What more can one do? The thing is he was unavailable. I tried to see him during that period of time, and I couldn't get through Haldeman.

Q. Now, this was all after the termination, right?

MR. RAVEN-HANSEN: I don't understand your question.

BY MR. MORTENSON:

Q. After Fitzgerald's termination? A. Yes, in November, 1969.

MR. RAVEN-HANSEN: I object to the question. It

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Excerpts From
The Deposition of
Richard Nixon (R. 378)
Taken on October 2-3, 1979
[pp. 8-16, 27-31, 37]

[8] clarify, as I understand where you are headed on this, you are not asking what he's been told about Mr. Fitzgerald and all the things that he's learned happened at the D.O.D. or at the White House or whatever. You are asking what did he know at different points in time about Mr. Fitzgerald, what he did, what he said, et cetera.

MR. PRETTYMAN: Exactly. Based upon his present recollection.

MR. MORTENSON: Okay.

MR. PRETTYMAN: As I understood his answer before, at the time of the institution of the lawsuit he recollected nothing about Mr. Fitzgerald; but since then, of course, in preparing for this, he may or may not have had his recollection refreshed. And I'm simply asking him now everything that you recall. A. Well, again, trying to recall everything from this mass of material that I have not read at all, of course, and separating those things that I recall and things that others have submitted which I do not recall, this would be my best recollection.

I'm trying to get the dates in my mind. My first recollection of Mr. Fitzgerald's case is during the period when I was preparing for a press conference which occurred on December 8, 1969. That of course was 10 years ago, so what I am now telling you is based on studying the, not only the documents, but also consulting with counsel and [9] trying to refresh my recollection in that respect. In preparing for the press conference, I found in a briefing book a suggested reply to questions, or a question, that might come up on Mr. Fitzgerald and also an addendum in the book which Mr. Buchanan—who had responsibility to not only prepare the book, but to channel all suggestions from administration people as to particular areas that might be covered in the press conference—an addendum on this particular matter in which, in short, he indicated there

was controversy within the White House staff, and for that matter, it could be said, within the administration, as to how I should respond to questions on Mr. Fitzgerald.

On the one hand, the suggestion was that I support a decision that had been made by the Secretary of Air Force to, in his reorganization, to plan a decision to eliminate a number of jobs, including the one for Mr. Fitzgerald. A strong dissent, Mr. Buchanan included in his addendum to the briefing book, which was the way it was prepared—a book was prepared a week in advance; and then an addenda would be added as various views came in.

And the dissent which Mr. Buchanan supported was by Mr. Mollenhoff, who was then on the White House staff, indicating that I should not support the position of the Secretary of the Air Force and of the Defense Department in this matter.

At the press conference itself—I now go to [10] that—the—a reporter, I think—first name—Sarah, rather famous—Sarah McClendon, asked a question about several people in the Defense Department, including Mr. Fitzgerald, and I—since it was a rather long and rambling question, I said that in effect, that I would look into the matter. The record will speak for itself. You have that record. Shortly after the press conference, based on my, what would have been my usual practice, having answered the question in that way, based on my study of the record, based on my consultation with counsel and their study of the record, I told someone on the staff—and I would say that it was probably—I'm almost certain, but I cannot be sure—probably Mr. Haldeman—to look into the matter.

Thereafter, again not certain on the dates, but sometime before the—within, I would say, around a couple of weeks, I was informed again, I believe by Mr. Haldeman, that another position had been found for Mr. Fitzgerald.

The matter then came to my attention again when I saw reference to Mr. Fitzgerald in a news summary report covering an editorial in the Chicago Tribune, which had, as I well recall from previous years, had made a cause celebre out of Mr. Otto

Otepka and equated the administration's handling of the Fitzgerald matter with Mr. Otepka; and as was my custom at that time, I noted my concern. And counsel has, of course, that section of the news summary dealing with this. My note in effect, as I recall, "Haldeman"—I used just the [11] letter H—"Did we fumble on this? Check into it again."

In view of the fact that I—And again, I'm trying to give my best recollection of what happened—in view of the of the fact that I had asked Mr. Haldeman to check into it again, it therefore was—bore out the statement that I made earlier, that I had asked him before.

From that time on, I have no recollection of any conversations about the matter, of any communications with members of the White House staff or others, or with people in the executive branch, no conscious recollection of any concern on the matter, which might have been raised by newspapers or other things that were written, or other media coverage.

The matter then came to the year 1973. It then was raised again in a press conference, this time by Mr. Mollenhoff, who had since left the staff and had become the chief of the Des Moines Register's Washington bureau. Counsel has, for plaintiff, has the transcript of the press conference exchange between Mr. Mollenhoff and me on the questions that he raised which I responded to at considerable length, particularly since it involved the matter of executive privilege, which was very much in my mind at that time, since it was being raised in a very different context, which did concern me a great deal, as it should have.

There were the hearings of the Ervin Committee and the demands that were being made for White House personnel to appear before that committee.

[12] At the conclusion of the—of Mr. Mollenhoff's series of questions—I believe there were three—he asked specifically about Mr. Fitzgerald and the invoking of executive privilege by the Secretary of the Air Force, Mr. Seamans, in a Civil Service proceeding with regard to Mr.—the abolition of Mr. Fitzgerald's position in the Defense Department. In response to that

question, I indicated that I—that while I had not approved the invocation of executive privilege—the invoking of executive privilege, by Mr. Seamans, that it had been invoked by someone with the authority to do so under my direction, and had been properly invoked, that as far as the—Mr. Fitzgerald is concerned, as the record of the press conference will show, that I not only supported Mr.—I'm summarizing here—not only supported Mr. Seamans, but had ordered that he be—and I use the term fired—and that I supported that position, supported Mr. Seaman's position and stood by it.

After the press conference, there were a series of conversations with members of the White House staff covering, among many other things, the response in the press conference on the Fitzgerald matter. And it became clear to me then in discussing the matter, particularly with Mr. Ehrlichmann, that I had misspoke myself when I referred to having personally ordered the firing of Mr. Fitzgerald, that I had actually confused him with Mr. Rule, who was in the Department of Defense, and who had been publicly attacking my [13] appointee for head of the O M B, the man who had major responsibility for the mass reorganization we had intended during the second term.

After the course of the conversation—those conversations—it became clear to me first that I had misspoke myself, and second, that it was necessary to do what most presidents find it very difficult to do, to have it corrected, publicly corrected. In fact, it's more difficult for press secretaries than it is for presidents . And we had had up to that time a rather good track record in being quite precise in our press conferences, and quite accurate.

And Mr. Ziegler, my press secretary, the following day, after I had talked to him briefly, in a very busy day when I was receiving Prime Minister Heath, walking over to the ceremony, or something of that sort, I told Mr. Ziegler to correct the false impression that had been left that I was referring to Mr. Fitzgerald when I used the term firing.

I think that's a summary up to this point, if counsel wants to fill it in. After all, it's a little difficult to try to recount everything. But if counsel has documents or other testimony or

something of that sort, I want to cooperate to the extent that I'm able to do so.

Q. Thank you very much. That's very helpful.

You said that the first time that you heard of Mr. Fitzgerald was in reviewing a briefing book for the [14] December 8, 1969, press conference. You had not heard his name mentioned up until that time? A. I don't recall having heard his name mentioned.

Q. And you had not read anything about him in the newspapers? A. I don't recall having—consciously recall having read anything about him, certainly not at this point.

Q. And you don't recall anyone speaking to you about him up until that point, up until the briefing book? A. In preparation for the briefing?

Q. Yes. A. No, I do not recall.

Q. When you came across his name in the briefing book, therefore, this was an entirely new name to you? Were you familiar with the subject matter in any way, or was this an entirely new subject? A. It was not a—the question of Defense Department spending was not a new subject. That had been, of course—had been and is now, always an issue. But as far as his—as Mr. Fitzgerald's specific activities are concerned, it was, yes, to my recollection—the best of my—a new subject at that point

MR. VON KANN: Let me just interrupt. Both the examiner and the witness are speaking in fairly low tones. I want to make sure the court reporter is able to hear both the questions and the answers.

[15] THE REPORTER: Yes. But I was going to ask you to keep your voice up, please.

MR. VON KANN: If the fan—

THE WITNESS: I can talk louder.

MR VON KANN: Would it help if I were to turn off the fan?

BY MR. PRETTYMAN: Q. You were not aware, up until your preparation for December, that Mr. Fitzgerald had testi-

fied before Senator Proxmire's subcommittee about an overrun on the C-54 cargo plane? A. I was not—I was not—I was certainly not aware of it in terms of the preparation for this press conference. I, of course, cannot say that in all of the reading that I had done, and so forth, that some article or something appeared, or news something, or something else, with regard to this matter. But I was not, to answer your question directly, I was certainly not focused on the matter.

Q. Just to summarize that: To the best of your recollection now, you recall nothing prior to the preparation for the press conference of December 8 about the testimony on the C-54 cost overrun? A. That's the best of my recollection now; that's correct.

Q. Now, you mentioned that it was brought to your attention by Mr. Buchanan's addendum that there were [16] apparently two different views in the White House on what to do about about Mr. Fitzgerald. And you mentioned that Mr. Buchanan and Mr. Mollenhoff issued, I believe you said, a strong dissent to the view that you should support the Air Force. Who was on the side of supporting the position of the Air Force, if you recall? A. The Defense Department. When I said within the—I said, as you may recall, if counsel will care to read the transcript, I said within the White House and within the administration. The Defense Department, Mr. Laird and others, were strongly on that side.

Q. And who besides Mr. Laird, if you recall? A. Mr. Seamans.

Q. And how did you find out that Mr. Laird and Mr. Seamans were strongly of that view? Was that in the Buchanan memo, or was that told to you? A. It was in the Buchanan memo. That's in counsel's record.

Q. So as best you recall, the only two names on the side of supporting the Air Force were Mr. Laird and Mr. Seamans; you recall no one else now who expressed that view? A. No, I don't. I don't recall anybody on there. I should explain that Mr. Buchanan had very broad authority in preparing for a press conference. As counsel knows, one must be prepared for

perhaps 300 questions in a period of 30 minutes. You may answer 10 or 15, sometimes 20. Views flow

* * *

[27] Q. A month later. You have seen the transcript of that conversation? A. Of February 28?

Q. If it was February 28, yes, sir. A. Yes, counsel has it. Counsel for plaintiff has it. I've seen it.

Q. And you were referring to Mr. Fitzgerald in that conversation? A. Yes.

Q. So I take it you did order Mr. Fitzgerald reinstated? A. Did I order him reinstated?

Q. I believe you said you told Mr. Haldeman to get him a job. A. Yes. That's the point. Now—but I should point out now: I didn't say reinstate. I don't believe I did. If I did, I'd like to correct the record.

Q. I thought you said you said to get him a job. A. I know. We are trying to reconstruct facts from ten years, and it's probably more difficult for counsel than even for me; but, no. I wanted the matter taken care of. I didn't want to have a public flap. There are several instances in this record which indicate I said he seems to be—for example, Buchanan's memorandum to me, he seems to be a dedicated public servant. That was one point of view. And he had a reputation as a cost-cutter. In fact, Ms. McClendon's [28] question refers to the fact that he cut two billion dollars out of the defense budget, as you may recall. This was back in 1969.

We must separate, Counsel, as you well know, the '69 period from the '73 period.

Q. Right. A. And that's what I will try to do; and if counsel will be of assistance to me on that, I would appreciate it.

Q. Certainly. A. But the main point is: I mainly wanted the matter handled without a flap, and I didn't want an injustice done to the man simply because he got in the way, or might

have gotten in the way, crosswise, with, basically, the Defense Department establishment.

Now, there is a Defense Department establishment. There's a State Department establishment. There's a president. And all presidents have at times have had to fight that establishment. I was not prepared at that point, or did not feel that it was wise to take them on frontally in this matter. But I did, in fairness to Mr. Fitzgerald, not only once, but as I pointed out, twice—and this is my best recollection, borne out by the facts I mentioned earlier—said, "Try to get him another position." And it was my understanding, or at least, it's my recollection, I should say, based again on these factors that I have mentioned, that on about, on or around December the 18th, that I was informed, again I believe [29] by Mr. Haldeman, that he got into a position of what was the Bureau of the Budget, which seemed to me at that point to be an ideal position for him, because, as counsel is well aware, since he is a cave dweller in Washington, the most powerful cost-cutting body in Washington is not the Defense Department and not the State Department and not the White House. It's the Bureau of the Budget. So if a person who was a cost-cutter and getting in people's hair, as apparently he was in the Defense Department, in both administrations, the Bureau of the Budget seemed to be a good position. Unfortunately, it didn't work out.

I would say now, incidentally—in fairness to counsel's client, that I—I noted that President Carter— in fact, I noted it not during the campaign but in preparing for this, that he has made somewhat of an issue, as he had every right to, of the Fitzgerald matter, because he was coming on for cost-cutting, and indicated that that wouldn't happen in his administration. And I would hope that maybe as a result of this case, as a result of this deposition, that President Carter and his administration would offer Mr. Fitzgerald now a top position in the government, which would give an opportunity for him to exercise his talents, which he apparently has, to be abrasive, as a cost-cutter must be. In fact, he might make a Director of the Budget. I'm not suggesting, of course, what President Carter should do. I'm only saying that as far as Mr. Fitzgerald is concerned, if he [30] would like to be in the government at this point and not just at

the position he currently is in, I strongly believe that he should be, based on what I know in this case, because I have had—and I have not had in the past and I have not now, any personal animosity toward Mr. Fitzgerald.

Q. You indicated that unfortunately the Bureau of the Budget job did not work out. What was the information that you received about that? A. Well, the point was that when I say the news summary a few days after the December 18 period, the news summary had the editorial from the Chicago Tribune —usually an administration supporter—but being very critical of our handling of this matter. And I wrote on the news summary, "Maybe we fumbled this. Look into it again."

Now, I had a number of things, as counsel—as I reiterate—I'm not trying to excuse, because a president is supposed to be able to handle everything, including the menus at the White House parties and who plays on the White House tennis court. But on the other hand, I do say that, in this instance, this was a terribly difficult time. Counsel was in Washington. Counsel knew people were demonstrating around the White House, that you could hardly get any sleep during that period of October, November, December, and January. I was thinking of such matters. I was thinking of other matters, too.

Right at this period, for example, in early [31] January of 1970, I was preparing my first orally delivered State of the Union message, a message on the environment, incidentally, which was then becoming a very hot issue. And we come back then to Mr. Fitzgerald in that context to find—to read in a news summary that what I thought had been done, and what was an irritating problem only, just an irritant—I didn't consider it vitally important, I must say. I thought other things were more important. But when I found that this irritant—that nothing had been done, frankly, I was frustrated. And that's what the note indicated.

Q. Excuse me. A. Then thereafter apparently, nothing was done. Now, possibly a president should not only mention something to his staff, even though it's a lower order of magnitude in terms of his own priorities, not just once, but twice, but maybe three times. I did it only two times. Maybe if I had done it again, we could have gotten some action.

Q. Did you mention a specific job or did you just simply say, "Get him a job"? A. I don't remember the specific conversation, but I knew that the job had to be one that had—that gave him at least the same pay and gave him some responsibilities. It does stick in my mind that the job had to do with the budget, which I thought would be the very best place he could be, and where, if I were a cost-cutter, I'd want to be in Washington more than anyplace else.

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[37] BY MR. PRETTYMAN: Q. Do you know what the handwriting on the left hand top corner is, Mr. President? A. No.

MR. PRETTYMAN? Is this Plaintiff' Exhibit 160?

THE REPORTER: Yes, sir.

BY MR. PRETTYMAN: Q. Mr. President, you have been handed what has now been marked Plaintiff's Exhibit 160 for identification, and I ask you if that is a memo to which you previously referred as a portion of your briefing book preparatory to the December 8, 1969, press conference, setting forth the two views that were being set forth in regard to Mr. Fitzgerald? A. This is the document. I should note that this is dated December 8, 1969, which would indicate— having in mind the fact that briefing book is usually prepared about a week in advance, this was in about a week's preparation time—that the disagreement within the administration as of that late date on the very day of the press conference was still not resolved.

My recollection is based on previous practice, that this was brought to me prior to the press conference, Buchanan having already indicated, of course, in his December 5th memorandum, his view, which supported Mollenhoff's view, that we should take the other position. I think it reflects well on him, that in this particular addendum he presents both views, which was his practice usually.

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Excerpt From the Deposition of Richard Nixon (R. 604) Taken on February 7, 1980 [pp. 9-16]

[9] THE WITNESS: Because of Mr. Prettyman's very good cross-examination previously, I have finally begun to separate these two periods in time, which is difficult, four years elapsing between the 1969 period and the '83 period—

MR. MORTENSON: '73.

THE WITNESS: We do go on, don't we? I hope the case isn't still before the courts in '83. Could be.

MR. VON KANN: Stan, these documents you just itemized, do I understand the representation is they were shown to Mr. Nixon in preparing for this deposition today?

MR. MORTENSON: Yes.

BY MR. MORTENSON: Q. Now, from your examination of these documents, Mr. President, would you tell me whether you have any additional recollection now concerning what you did in connection with the Fitzgerald matter following the press conference of December 8th, 1969, in which you were asked a question that involved a reference to Mr. Fitzgerald? A. Well, not having any independent recollection of what occurred 11 years ago, based on looking at the notes of Mr. Haldeman, Mr. Ehrlichman and the other memoranda that have been introduced as exhibits, my recollection as refreshed would indicate the following items: The day following the press conference where Miss McClendon asked the question and I said that I would look into the matter, Mr. Haldeman's notes indicated, and my memory being refreshed [10] would verify this, that I raised the problem with him and apparently suggested that a position be found for Mr. Fitzgerald in the Bureau of the Budget. The following day after that Mr. Ehrlichman's notes indicated that the same matter was raised with him.

I should point out, it was my custom, quite often, not to stop at raising matters with one person, but to raise them with others as well who might have similar responsibilities.

Then approximately a week or so afterwards—I can't pinpoint the date—during the period of the budget review, which, as all of you know, takes place in the month of December, in one of the regularly scheduled meetings with Mr. Mayo, the then Director of the Budget, notes on that meeting that were made and which have been shown to me refreshed my memory that I raised the problem of Mr. Fitzgerald with Mr. Mayo and asked that he look into the matter. I cannot recall exactly what the conversation was. I would, however, say that the notes generally have been accurate when I have examined them in this matter.

Then thereafter, shortly before Christmas, a few—

Q. Let me interrupt you just a minute. A. Surely.

Q. Do you recall when, after the meeting the first time that you can recollect talking with Mr. Mayo about [11] a position for Fitzgerald in the Bureau of the Budget, did you discuss the matter with Mr. Haldeman?

MR. VON KANN: Objection. Leading. A. Well, after I had discussed the matter with Mr. Mayo, my recollection, based on having seen documents since then, is that I at least informed Haldeman, who was not present at the meeting, of what I had done.

Let me explain the process. Mr. Ehrlichman, who was in charge of economic, or I should say yes, economic matters and domestic matters, would be present at a budget meeting. It was not Mr. Haldeman's practice to sit in on budget meetings. And he as Chief of Staff, it was always my custom in my morning meetings with him to inform him if actions had been taken. And particularly in this case where I had previously raised the matter with him, it would be, of course, understandable that I would inform him of what I had done with regard to Mr. Mayo.

Q. All right. Now, going beyond this mid December part, did you subsequently have any conversation with Mr. Mayo concerning Mr. Fitzgerald? A. Again, based on the notes of meetings, a budget meeting that was taken shortly before Christmas, Mr. Mayo and I discussed the matter. Mr. Mayo indicated in that meeting that, first, he did not have a super-

grade position which he could offer to Mr. Fitzgerald, which would be the only kind of a position that would be commensurate with Mr. Fitzgerald's [12] previous employment, and commensurate in my opinion with the kind of employment which he should have at this time.

And then he also objected to finding a position for him, clearly apart from the fact that he did not have a supergrade position, because, in his checking on the matter, he felt that Mr. Fitzgerald would be a pipeline for Mr. Proxmire, Senator Proxmire, directly into the White House, in view of the fact, of course, that the Bureau of the Budget is in the White House.

The notes—based on my reviewing the notes, I accepted Mr. Mayo's position on this. I was in a very difficult situation, incidentally, insofar as overruling him on the first point, because we were, at my direction, preparing a very austere budget for the Congress for the next year, and I had indicated very strongly to Mr. Mayo and everybody in the White House that the White House must set the example in not only not adding new positions but in reducing positions. And we were hoping that that would be an example for the rest of the administration to do likewise.

Consequently, Mr. Mayo's objection that he did not want to add a supergrade position was one that I could not with any enthusiasm overrule. However, while I do not have a—while I do not have a—have not seen a document that would bear out my next recollection, what I believe might have happened, rather than an independent recollection, it is my very strong belief that he did not drop the matter [13] there, and that I raised it again with Mr. Haldeman.

I base that on the fact that, as I testified previously last fall, when I saw the note in the news summary in the Chicago Tribune, from the Chicago Tribune editorial, when I said to Mr. Haldeman to check it again, that I would not have put that on there had I concluded from the conversation with Mr. Mayo just before Christmas that the matter was closed.

Thereafter the note in the news summary that I have previously testified about, I cannot at this moment recall Mr.

Haldeman's reaction except that there had to be a follow-up due to a—my having now seen a memorandum from the staff secretary indicating that Dr. Kissinger had responsibility in the matter or had looked into the matter and a notation on the staff secretary's weekly report to the effect that Fitzgerald—that no position had been found.

Let me explain: Dr. Kissinger would not have had any responsibility with the Bureau of the Budget. His responsibility would have been with the Defense Department or the State Department or some other department related to national security matters. And consequently—and again, at this point I am—I cannot be sure I have not seen a document indicating what I told Mr. Haldeman, if I told him something, which I believe I did, after the budget meeting.

I am convinced that, either as a result of a conversation with Mr. Haldeman after the budget meeting or as [14] a result of my notation on the news summary to which I have referred, that the matter then was taken up with Dr. Kissinger, with Dr. Kissinger and/or somebody on the National Security Staff, to see if Mr. Fitzgerald could find a position, probably in the Defense Department.

Q. Let me have the—

MR. VON KANN: Stan, I move to strike all of the answer after "I accepted Mayor's position on this," as nonresponsive.

MR. MORTENSON: Okay. Let me have that marked as Defendant's Exhibit 173.

(Document marked Defendant's Exhibit 173 for identification.)

BY MR. MORTENSON: Q. Mr. President, I put before you a document marked Defendant's Exhibit 173 and ask you to take a look at it, and if you can, identify it for us. A. Yes, I can identify this. This is a result of a practice that I had initiated after the first year in office of trying to follow up on requests that I had made to see whether action had been taken on them. It wasn't that I didn't have confidence in my staff; it was that I felt that I should know when the staff had followed up or when the staff had not, and the reasons for no doing so.

Now, by requests, such requests would be—would have been—and for example, during the week of January 26 to February 2nd, either requests that were made [15] orally in meetings with staff members or requests that were made by noting something on a news summary or requests that were made by memorandum that I would independently dictate or requests that were made by telephone, and the procedure—I would say based on the handwritten note on it at the top, "Good job, keep it up," this relates to the fact that this seemed to me to be a very complete follow-up of carrying out my directive, of keeping me posted each week on what had happened on presidential requests.

Q. Can you identify the handwritten material on the upper right-hand corner? A. That's my note. That's mine.

Q. Would you tell us what it says again? A. It says, "Good job, keep it up"

Q. Now, directing your attention to the second page of the document, do you recall—does the document refresh your recollection at all concerning anything having to do with Fitzgerald? A. Yes. Item ten relates to the Fitzgerald matter. It says, "Jeb Magruder's report on Mr. Fitzgerald is attached at Tab G. Dr. Kissinger feels no further action is necessary."

Q. Now, let me direct your attention to the next page of the document, which is a memorandum containing Mr. Magruder's name. Do you know whether you have ever seen that document before? [16] A. I have no recollection of having seen it, no.

Q. Do you know one way or the other whether it was, in fact, the attachment to the staff secretary's memorandum? A. No, I would not know one way or the other except that its being attached at this point would indicate to me that it had been attached to the memorandum.

Q. All right. A. I would not—. Let me say that I cannot say that I did not review it and I cannot say that I did. I should point out that in the mass of material that comes across—came across my desk, and of course the desk of any president, it was

generally my practice to read the cover memorandum, the summary, and seldom have the time to read the attached documents. To me the decisive thing in here: "Dr. Kissinger feels no further action is necessary."

Q. Okay. A. I had confidence in him and also his judgment.

Q. Now, let me put before you a document that has been previously marked as an exhibit in this case—the document is Defendant's Exhibit 112—and ask you if you recall seeing this document in preparing for this deposition? A. I think I've been asked about this before, but my answer now is the same as I assume it was then. I do not recall seeing it. I can't say that I didn't. I can't say that I did. And it would be very presumptuous for me to say that I could remember seeing a document 11 years after the

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Excerpt From the
Deposition of
James R. Schlesinger (R. 432)
[pp.4-8]

[4] PROCEEDINGS

Whereupon,

JAMES R. SCHLESINGER

was called as a witness and, having been first duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR DEFENDANTS ALEXANDER P. BUTTERFIELD AND BRYCE HARLOW

BY MR. LANDMAN:

Q. Mr. Schlesinger, just for the record, would you please state your full name? A. James R. Schlesinger.

Q. Would you state what your position was in the government in the time period of November-December, 1969, to January, 1970? A. I was at that time Acting Deputy Director of the Bureau of the Budget.

Q. Mr. Schlesinger, do you know Mr. Fitzgerald? A. Excuse me.

It became the OMB in the summer of '70. It was the Bureau of the Budget.

No; I have never met Mr. Fitzgerald.

Q. Are you aware of who Mr. Fitzgerald is? A. I am.

Q. When did you first hear of Mr. Fitzgerald? A. I presume—and this is not direct recollection—I [5] cannot recall the time, but I was aware of his role in the C5A, whatever it was, the discussion of the cost overruns of the C5A before the—Proxmire's Committee.

Q. To the extent you can recall, what was the source of your knowledge of Mr. Fitzgerald? A. The press.

Q. While at the Bureau of the Budget, did you ever have any discussion with any individuals with regard to Mr. Fitzgerald? A. Yes, indeed.

Mr. Mayo came to me, the Director, came to me, and I wouldn't recall precisely when it was. It was the end of 1969 sometime. And he indicated that there was a desire of the part of the White House to place Mr. Fitzgerald some place Mr. Fitzgerald some place other than—find a position for him outside of the Department of Defense, if I recall, outside of the Air Force. I think he was with the Air Force at the time; that it was suggested—it had been suggested by somebody over there—and I can speculate on who, because we had the same contacts all the time in the White House—and it was suggested that he be brought into the Bureau of the Budget.

Mr. Mayo asked my advice on the subject, asked me to reflect on it.

As I recall, I gave him my advice immediately; that it would not be a good idea; but I did reflect on the subject [6] and went back to Mr. Mayo.

Q. Why did you believe it not to be a good idea? A. For a number of reasons.

In the first place, I did not think that the Bureau of the Budget should be a receiving ground, as it were, for what were regarded as the problems of other agencies. The Bureau of the Budget had a lead staff that was quite cohesive. Given Mr. Fitzgerald's reputation as a source of information to Capitol Hill, and to Senator Proxmire specifically, I thought that it would be a disruptive factor in the operations of the Bureau of the Budget.

In addition to that, the Bureau had only a limited number of slots. I believe—and somebody can give me the information on this—I believe that Mr. Fitzgerald was a supergrade or we would have had to provide a supergrade slot. We had a limited number of slots.

The Administration at that time was intending, indeed, was engaged in the attempt to reduce government expenditures in government personnel. My recollection is at that time that the Bureau of the Budget itself was taking some reductions, so that put an even greater downward pressure on the availability of slots. And under those circumstances, I thought it would not be wise.

Let me say in passing that the notion was that Mr. Fitzgerald be brought into the Bureau of the Budget to work [7] on something other than the defense area. The suggestion had been that he be brought in to work on something other than the defense area; that is, he be brought in to work on non-defense work.

Given the structure of the Bureau of the Budget, he would have been forced—would have required forcing him down the teeth, as it were, of one of the division directors or else establishing some kind of floating spot outside of the existing divisions. I thought that the former would itself create some problems, some problems of public position, and in general, I just did not think it was a very good idea.

Do you want me to go on?

Q. Yes. A. This is recall.

I believe that I went back again to Mr. Mayo some days later and reiterated after two or three days reflection on it, whatever it was that, indeed, that would not be a good idea. And I believe I stated that more forcefully than I had on the first occasion.

Mr. Mayo accepted those judgments, and he took it from there. I do not know the details of his conversations across the street in the White House; but in the course of a conversation weeks later, if I recall correctly, he just mentioned that the issue seemed to have gone away. So that presumably, the reluctance of the Bureau of the Budget to [8] provide a supergrade for Mr. Fitzgerald was sufficient to persuade those in the White House who had had this idea not to reiterate it or not to carry it forward any longer.

Q. Did you have any conversation with Mr. Harlow at that time, or any time, with regard to Mr. Fitzgerald? A. Let me say that I knew Bryce Harlow moderately well, just moderately well. I had occasional meetings with him with regard to legislation.

The answer to the specific question is, no, Mr. Harlow—I never had a conversation with Mr. Harlow on this subject. As a

matter of fact, I had no conversation with anybody from the White House, on staff, on this subject.

A. I believe you stated that you learned of an effort by the White House—A. Let me say I was just as happy that Mr. Mayo carried on those conversations and I did not have to get involved and that the subject just seemed to go away.

Q. Thank you.

With regard to your discussions with Mr. Mayo, did Mr. Mayo agree with your assessment? A. Yes, sir.

Q. believe that you stated in your answer that you became aware of the fact that the White House was attempting to find Mr. Fitzgerald a job outside the Department of Defense.

* * *

Excerpts From
The Deposition of
Robert C. Seamans, Jr. (R. 334-35)

[pp. 2-79, 2-114 to -117, 2-124, 2-134, 2-142 to -143; 3-99 to102, 3-110 to -112, 3-188 to -203, 3-213 to -216, 3-219, 3-226 to -227, 3-234, 3-240 to -243]

[2-79] what there is there, it is clear, isn't it, or of that much of the exhibit, that if this reorganization were put into effect the position of Deputy for Management Systems would no longer exists? A. Yes. Yes, there is no reference to Deputy for Management System on these two pieces of paper.

Q. And didn't you, in fact, come to know in early May 1969 that Mr. Nielson had developed a formal written reorganization of his office; which reorganization, if implemented, would eliminate the position in which Mr. Fitzgerald was then employed? A. I was familiar with his views. A new Assistant Secretary of the Air Force of Financial Management was about to be installed. I was making sure that the new Assistant Secretary had all the information from all possible sources as to the situation and was going to await Mr. Schedler's views on the matter after he became Assistant Secretary and had a chance to carefully study the testimony.

Q. That's not responsive to my question, so let me state that again. Listen carefully. Isn't it a fact that in early May 1969 you came to know that Mr. Nielson had developed a

* * *

[2-114] logs and find the specific place, and I'm not sure I could identify it if I did.

Q. Now, sir, can you please tell us, as accurately as you can now recall, everything that you said to Mr. Harlow and everything that Mr. Harlow said to you during the course of this telephone call on May 9, 1969. A. First, let me say that at this time we had not decided on a course of action, but we needed an assessment of the situation on the Hill if we were to make a change in the management arrangements in the Office of Financial Management. And it was on that basis that Mr. Laird asked me to call Mr. Harlow.

Q. Let me ask you one thing. I don't want to interrupt.

MR. NIGHTINGALE: Excuse me. I think you should let him finish, Curt.

MR. VON KANN: I will, but I think it will save time if I may ask a question about a statement he just made; and then I'll let him complete his answer.

A. All right.

Q. When you say about the reorganization of [2-115] the office and getting an assessment, was that specifically an assessment of what the impact would be of a reorganization that resulted in the abolition of Mr. Fitzgerald's job? A. Yes, it was.

Q. All right, sir. I'm sorry to interrupt. Please continue. A. That's perfectly all right.

And Mr. Laird asked me if I would make the call. I normally did not have contact with the White House. These matters were normally handled out of Mr. Laird's office, but he felt that I was in a better position to discuss all the aspects of the reorganization with Mr. Harlow; and so he asked me to make the call.

I don't remember the details of the conversation. I do remember that I acquainted him with the background. I reminded him of the relationship of Mr. Fitzgerald to the C-5 and the testimony that had occurred during the previous Administration and asked him for his assessment of the waves that might occur on the Hill if we were to make that change.

Q. Now, what do you recall Mr. Harlow saying [2-116] to you in response to that? A. Well, here's where I'm really not sure exactly as to what he said and what was said somewhat later in the day.

He said he would. I know he said he would have to look into it and that he would either call me back or I would get a call from someone else in his office.

Q. All right, sir. Let me ask you, in that connection, to look at the log entry on May 9, 1969, for 4:15 p.m. showing a telephone call with Lamar Alexander—White House phone.

Do you see that, sir? A. Yes.

Q. Now Lamar Alexander was one of his deputies wasn't he, Harlow's deputies? A. Yes.

Q. Does that help you refresh your recollection at all that perhaps Mr. Alexander got back to you later in the day? A. I'm certain that is the case.

Q. Let me ask you, then, if you can do this.

MR. NIGHTINGALE: Excuse me. I think you interrupted him there. As long as he will be [2-117] allowed to finish.

MR. VON KANN: He will, indeed. I just want to make sure he understands the scope of my question.

Q. With those two entries in mind—the first call at 1:41 Bryce Harlow—White House phone, and the second call 4:15 Lamar Alexander—White House phone—try to tell me, as best you can, what Mr. Harlow told you in the first phone call and what Mr. Lamar Alexander told you in the second call. A. All right. Now, I really have difficulty differentiating between the two, but the substance of what was said by them was that this was a very sensitive item on the Hill and that it would be their recommendation that we not proceed to make such a change at that time.

Q. All right, sir. Now, let me ask you a couple of questions about the mechanics of the phone calls. A. All right.

Q. The first phone call to Bryce Harlow which is listed 1:41 has the symbol TC-o, which I understand to be the symbol for telephone call outgoing; correct?

* * *

[2-124] A. We were really asking for his personal assessment. We were definitely not asking him to take a sample of opinion at the White House, but just from his own standpoint working with the Congress what would be the implications of such a move.

Q. You knew, did you not, sir, that if the response came back negative from Mr. Harlow's office you weren't going to go

forward with this move; true? A. No. I knew that if it came back with a positive or negative this would be an input in my view of what we should do and Mr. Laird's view, that I would take this as one piece of information that we would use in the Department of Defense in making our decision.

Q. Now, sir, I would ask you to look at Plaintiff's Exhibit 94, your oral history, and in particular on Page 11. Please read the first full paragraph on that page, read it to yourself, and then I want to ask you a few questions about it. A. You're talking about the last paragraph?.

Q. On Page 11 it begins: "I thought at that time . . . " A. Yes, okay. (Examines documents) I've read

* * *

[2-134] question of timing?

MR. NIGHTINGALE: I'll object to that. You've tried to put the witness' answer in other words. I think the answer speaks for itself, and I didn't understand the answer as being that. I'll object to that for lack of foundation as being an improper characterization.

MR. VON KANN: I'll rephrase the question, but I think it is proper.

Q. The response that came to you from Mr. Harlow's office was that this is not a proper time, this is not the best time to do it rather than this is not a proper thing to do, you shouldn't do it? A. We didn't ask him to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress.

Q. Now, I want to return to a question I asked earlier, and I do not believe it was answered. And that is when Mr. Harlow said or Mr. Lamar Alexander on his behalf said this is not the best time to separate Fitzgerald, was there a discussion in that phone call about, Well, when can we do it, when would be a permissible time or a good time to separate Fitzgerald?

* * *

[2-142] White House for the breakfast on May 15, 1969? A. Yes, I do.

Q. All right, sir. Tell us, as fully as you can now do so, everything that Mr. Harlow said to you and everything that you said to Mr. Harlow while you were at the White House on May 15, 1969. A. Well, what I remember is that perhaps it was after a service in the East Room. Anyway, we were over in the West Room where there were, as I remember it, tables set up full-face style; and people were milling around chatting with each other. I remember Bryce Harlow and I coming together by happenstance and his asking me how things were going in the Air Force and about the performance of Mr. Fitzgerald and the actions that we were taking. And at that time I gave him an update on where we stood, and I don't remember his giving me any advice or counsel. I just remember it as a time when he asked me for an update.

Q. Well, what did you say to him by way of an update? A. Well, I can't remember what I specifically said, but by that time I had reported back to Mr. Laird both on the conversation with Harlow as well [2-143] as on the conversation with Mr. Hampton of the Civil Service Commission; and we decided that—he decided, Mr. Laird decided, that he would try to find an opportunity for Mr. Fitzgerald somewhere else in the Department of Defense.

MR. VON KANN: I'm going to mark the next one as 127 which was previously marked as an earlier numbered exhibit. Unfortunately, I don't have the number; so again, he'll have a duplication. (Document marked as Plaintiff's Exhibit 128 for identification)

Q. Dr. Seamans, I will represent to you that Plaintiff's Exhibit 128 has been authenticated earlier in the deposition by Mr. David Wilson, who was then an assistant to John Dean at the White House, as being notes he made in or about, on or about January 31, 1973, when he was attempting to reconstruct what contacts had occurred between the Defense Department and the White House with regard to the Fitzgerald matter. And I want to direct your attention and ask you to read to yourself the entry that appears midway down the first page by the date May 15. A. (Witness complies)

* * *

[3-99] Q. Were these December 5, 1969, calls regarded by you or your staff as sensitive? A. Not to my knowledge. I mean no more than any other calls.

Q. Well, I wonder if you know why the author specifically said, "We will have to discuss both of these calls," these December 5 calls. There's no reference to any other discussion. A. I can't answer that.

MR. NIGHTINGALE: Objection. Excuse me, Dr. Seamans. First of all, I think there's a lack of foundation there. Second of all, I would just like to state—without wanting to characterize the document—that I don't necessarily concede that both of these calls refer to any two particular calls in the document, Curt.

MR. VON KANN: All right.

Q Dr. Seamans, let me ask you to do this if you would. Can you recount for us, as accurately and as fully as you now can recall, exactly what was said by you and exactly what was said by Mr. Mollenhoff?

Let's take that one, first, your December 5, 1969, telephone call with Clark Mollenhoff. [3-100] A. The issue that we were discussing—and the one that deeply concerned me, I've already mentioned just before the break—had to do with the possiblity that the White House would reverse the Air Force and the Department of Defense's decision to abolish Mr. Fitzgerald's job.

Q. Dr. Seamans, let me ask you to do this. I'm sorry to interrupt, but I think you're not being quite responsive. Rather than characterizing the call, I would ask you, to the best of your present recollection, to tell me what was said if you can.

What did Mr. Mollenhoff say to you? What did you say to Mr. Mollenhoff, as best you can recall it? A. I can't possibility give you a verbatim—

Q. No, I understand that. But, in words and substance, what did Mollenhoff say to you? What did you say to Mollenhoff?

MR. LANDMAN: I think that's what Dr. Seamans was doing. I think he was giving you, to the best of his recollection, what the substance of that conversation was.

Q. I don't mean to cut you off. What I want to ask you to do, Dr. Seamans, is, to the maximum [3-101] extent you can, simply recount the call rather than characterizing or concluding. I recognize you do not have a transcript and you can't give it to me verbatim; but, as best you can recall, I would like to know how it went.

Who spoke first? What was said? What did the other party then say and so on? A. Well, it had come to my attention that the, quote, While House was considering ordering the Department of Defense and the Air Force to reserve their decision.

And in the phone conversation, I expressed to Mr. Mollenhoff a very great, very strong objection to any such action being taken; and he, in turn, expressed to me his concern for the political consequences of continuing with the action that we had taken, the action to abolish Mr. Fitzgerald's job. He was not, in the conversation, ordering me. He was, you might say, threatening me.

He was telling me that the matter was being reviewed at the White House and that we are going to be told to change; and I was saying that it would be over my dead body that we would make any such change.

In talking about it now, I remember that [3-102] there had been an article in the newspaper—I think it was The Chicago Tribune—which had indicated that the White House was taking this under advisement and might or would probably ask or demand that the Department of Defense change its views because of the nature and so on of the action that we had taken.

And it was that article which I very much suspected had been leaked by Clark Mollenhoff that caused me to get extremely exorcised about the whole matter and led to my discussions with Mr. Packard and Mr. Harlow and Mr. Mollenhoff.

Q All right, sir. Now, I think I have perhaps taken these events out of chronological order; because as I look back on

your log for December 5, it says that you spoke to Mr. Harlow before you spoke to Mr. Mollenhoff.

And you've just said, sir, that this Chicago Tribune article led to your discussions with Mr. Packard and Mr. Harlow. A. Well I'm not sure that was the only article.

Q. As a stimulus? A. There was an article. I'm not even

* * *

[3-110] I realize that Mr. Packard was aware of the Fitzgerald matter, but I really cannot recall in detail conversations with him about Mr. Fitzgerald.

Q. Do you recall relaying to him your reaction to The Chicago Tribune article? A. I can't be positive that I did. I know that I was extremely upset that there was thought of action that would reverse the decision that we had made, and he would have been the one person that I would go to at that time since Mr. Laird was away.

Q. All right. Now, you did not speak to either Mr. Harlow or Mr. Mollenhoff on December 4; but you did speak to both of them on December 5, true? A. Yes.

Q. Now, the logs show that the first of those two that you spoke to was Harlow, correct? A. Yes.

Q. Can you tell me, as accurately as you now can, what Mr. Harlow said to you and what you said to Mr. Harlow in that telephone conversation on December 5, 1969? A. Well, my recollection is that I relayed to him my concern and the facts; that I was quite upset [3-111] on the matter; that he didn't, that he was really noncommittal; and that he didn't give me any indication that such a decision was going to be made in the White House to reverse the decision of the Department of Defense. That's all that I recall.

Q. Did he say that he would relay your concern on this matter to the President? A. Not to my recollection.

Q. Did he express the view that the decision by the Department of Defense should stand? A. I don't remember him saying that, either.

Q. Was the result of the call totally inconclusive, or did he indicate he would do anything as a result of your call? A. I don't remember.

Q. When you say you relayed to him your strong concern, can you tell us as accurately as you can recall what you said by way of your concern on that matter? A. Well, I can't really recall the exact conversation, but I referred to information I'd received that the decision might be reversed. I believe I referred to the article in the newspaper and told him that it would be most inappropriate, in [3-112] my view, if decisions relating to management of the Air Force were reversed by actions taken in the White House.

Q. Did Mr. Harlow express any view on that one way or the other? A. I don't remember.

MR. VON KANN: Let me ask the court reporter to mark one more document. This will be the last before the break.

(Document marked as Plaintiff's Exhibit 141 for identification)

Q. I show you, sir, a document that has been marked Plaintiff's Exhibit 141 and ask if you have ever seen that before. A. No, I have not.

Q. Did it ever come to your attention that Secretary Packard telephoned Mr. Harlow concerning the Fitzgerald matter? A. I really don't remember.

Q. Do you recall in your discussion with Secretary Packard recommending to him that he contact the White House and express any views on the Fitzgerald matter? A. I told him the facts, and he agreed with me.

* * *

[3-188] MR. NIGHTINGALE: Back on the record.

CROSS EXAMINATION

BY MR. NIGHTINGALE:

Q. Dr. Seamans, did you sign the order which directed that the Financial Management Office be reorganized? A. I'm not

sure whether I did or not. I believe I signed the order that caused the abolition of Mr. Fitzgerald job.

Q. When did you do that? A. That was on the 3rd of November, I believe.

Q. Was that your decision to abolish Mr. Fitzgerald's job? A. Yes, it was.

Q. How did you go about making that decision? A. Well, as we've been discussing here, it was a lengthy process of gathering information from within the Department of Defense and from sources outside the Department of Defense, including asking the views of Mr. Harlow six months earlier or so. And finally it led to a recommendation from Mr. Schedler for the reorganization.

I should also say that I kept Mr. Laird and his deputy, Mr. Packard, informed throughout and had [3-189] taken any actions that they required prior to making the decision.

Q. Did you approve the recommendation that Mr. Schedler made in the form that it came to you? A. Yes. I did not change his recommendation.

Q. Did you involve yourself in the details of the process that led to his formulating that recommendation? A. I did not go into as much detail as he did on the specifics of each one of the functions in the office; but I did, in a general way, review with him—as I had reviewed prior to the time that he became the Assistant Secretary with Mr. Nielson—the responsibilities of the office.

So I was generally familiar with the functions as well as with the changes that he wished to make.

Q. Did you retain authority to approve, disapprove, or alter Mr. Schedler's recommendation? A. Yes. Mr. Laird stated on a number of occasions that he had asked me to review the management of the weapon systems acquisition procedures in the Air Force and, in particular, a review of the Financial Management Office. He had [3-190] stated that this was my responsibility and that he would support my decision.

Q. When you signed the order that abolished Mr. Fitzgerald's position, were you directed to do so by anyone? A. No, I was not.

Q. You weren't directed to do so by Mr. Nixon? A. No, I was not.

Q. By Mr. Butterfield?

MR. VON KANN: Well, just a minute. I'm going to object to leading questions. The witness stated he wasn't directed to do so by anyone, and it's redundant to give a lot of names. And, number two, it's leading.

Q. I'll rephrase the question and move on. Let me say where I stand right now.

When you approved the reorganization of the Financial Management Office, why did you do so? A. Well, the primary reason for making the change was really on two counts: One to improve the efficiency of the office; and the other was that it was part of a larger goal of reducing the number of personnel in the Secretariat by the order of 10 percent.

[3-191] Q. When you approved the reorganization, you were aware, I believe you've said, that Mr. Fitzgerald's position would be abolished. Is that correct? A. Yes, that's correct.

Q. You were also aware that some Congressmen had expressed an interest in Mr. Fitzgerald and that he had received public attention, is that correct? A. That is correct.

MR. VON KANN: Let me just note an objection, continuing objection to save time, to leading questions. This is a peculiar deposition in the sense of plaintiff's notice to this deposition, because they were advised that one or more of the defendants would be relying on the testimony of Dr. Seamans to support a motion for summary judgment. And to that extent we, in effect, have been conducting cross examination of testimony that we haven't yet seen.

Dr. Seamans was, of course, a subordinate of and associate of Defendant Nixon during the events in question. He's indicated that he had been told he might be asked to supply an affidavit to the defendants in this case. He's testified that he met [3-192] on two occasions with counsel for Defendant Nixon.

And, therefore, I submit that the record shows that Dr. Seamans is the witness of one or more of the defendants

including Defendant Nixon and that it is not appropriate or permissible for Defendant Nixon's counsel to conduct the examination of Dr. Seamans by means of leading questions.

But I will simply state that objection once as to all leading questions for the balance of the day and not repeat it each time.

MR. NIGHTINGALE: I think that's a good way to proceed. I, just so the record is clear, don't subscribe to that rationale, as I expect you expect that I wouldn't. But I agree that, to expedite things, a preferable way of going forward would be for you to have a standing objection to leading questions; and I recognize it and note it.

Q. Why did you approve the reorganization of the Financial Management Office knowing that it would result in the abolition of Mr. Fitzgerald's job? A. Well, as I've stated on a number of occasions, I believe, including in this deposition, I did not feel that the Congressional interest and [3-193] so on gave Mr. Fitzgerald immunity from such action. And in addition, as I've stated here, I had very real concerns about Mr. Fitzgerald's capability to work effectively within the Air Force.

It's not the primary reason for the decision, but this is in response to your question.

Q. That was your decision at all times, however? A. Yes, that is correct.

Q. Did former President Nixon ever instruct you to take any action whatsoever with regard to Mr. Fitzgerald? A. No. I never had any discussion with President Nixon with regard to Mr. Fitzgerald.

Q. Was there anyone who represented to you that he was acting on Mr. Nixon's behalf or as a representative for Mr. Nixon on who instructed you to take any particular action with regard to Mr. Fitzgerald? A. No, there was not. Quite the contrary. It appeared at one time that there was some question as to whether the White House might attempt to reverse our decision.

Q. Were you aware of whether Mr. Nixon had any [3-194] position whatsoever with regard to Mr. Fitzgerald in the Fitzgerald matter, generally? A. No, I was not.

Q. I'd like to refer you to your log of March 5.

MR. LANDMAN: '69?

MR. NIGHTINGALE: 1969.

Q. I direct your attention to an entry at 9:40 to 11:02, departed for White House for Goddard Trophy presentation to Apollo VIII astronauts.

Can you describe, if you remember, what that function consisted of, please?

MR. VON KANN: Let me object here. I certainly have no serious problem with the question, except I know that I specifically asked Dr. Seamans about that entry and he did describe it as a ceremonial function for Scott or Carpenter or somebody who had just walked on the moon or something. So it's already in the record, I believe; but you're free to go ahead and explore.

A. As I indicated previously in the deposition, this was a ceremony at the White House for the astronauts. Let's see. Borman was the lead, and Apollo VIII was the flight that went around the moon [3-195] on Christmas Eve.

It was a function with a large number of the Congress and the Administration present, and it was a kind of ceremonial function that often takes place at the White House.

Q. Was the President at the front of the room and behind a podium with chairs set out in front of him or something of that nature? A. Well, I don't now really recall the ceremony in detail.

Q. Did you have any occasion to speak to Mr. Nixon on that occasion? A. Not to my knowledge.

Q. I'd like to direct you to your log for May 15, 1969. A. May 16?

Q. May 15. There's reference at 8:30 to a breakfast at White House, slash, the President, et al.

How many people attended that breakfast? A. Well, this came up again earlier in the deposition. At that time I was not

really familiar—I don't remember. Apparently, there was some form of religious service. I do remember going to a few [3-196] at the White House where there would be—I don't know—several hundred people present.

Q. Did you have occasion to speak to Mr. Nixon at this breakfast? A. I don't recall.

Q. Did you speak with Mr. Nixon about the Fitzgerald matter at this breakfast? A. I don't recall that I did.

Q. Was there in any event, a large group there? Do you remember that? A. Well, the part that I remember more clearly than the ceremony in the East Room was the informal buffet breakfast afterwards where the people were invited to have juice and a danish and coffee, tea, and so on. And, again, I would guess there were on the order of a hundred, several hundred people present.

Q. I'd like you to refer to your log of May 16. At 1:39 there is an an entry there which refers to a conversation, Secretary Laird; and then the description that was given by the person who prepared the logs was re MOL meeting with, slash, the President and reorganization of FM Office as it relates to Dr. Seamans' conversation with Bryce [3-197] Harlow at White House.

Q. What was the MOL meeting with the President? A. Well, the MOL stands for Manned Orbital Laboratory, and this is a project that had been started by McNamara three or four years prior to '69 when I was in NASA. And it was a cooperative program with the space agency and managed by the Air Force. And at this time there was a question as to whether the Manned Orbital Laboratory would be canceled.

When I heard that this might be the case, I had asked prior to this time of Mr. Laird that he arrange a meeting for me to discuss the advantages and the reasons for continuing the project prior to any cancellation—I meant to say discuss it with the President prior to any cancellation—and the purpose of this phone call was to advice me that the meeting had been established; that I could bring with me General Stewart, who was the project manager; and that the Mr. Kissinger would probably be present.

Q. Was there any relationship in your mind between the Manned Orbital Laboratory and the Fitzgerald matter? A. Absolutely not. And I don't really recall [3-198] whether there was, in that same conversation, a discussion of my meeting with Bryce Harlow. It could have been. I just don't recall.

Q. I'd like you to refer to your log of May 17, 1969, the entry at 9:05 to 10:29.

MR. VON KANN: What was the date, please?

MR. NIGHTINGALE: May 17, 1969.

MR. VON KANN: And the time?

MR. NIGHTINGALE: 9:05 to 10:29.

Q. Was that the occasion of the MOL meeting which you described? A. Yes, it was.

Q. Did you discuss the Fitzgerald matter with the President at that time? A. No, I did not. I can remember the meeting very clearly, because it was a matter of considerable importance; and it was one of the few opportunities I had for substantive conversation with President Nixon.

Q. Did Secretary Laird explain to you why he suggested that you talk to Bryce Harlow in early May of 1969? A. I don't recall. I can speculate, but I don't remember.

[3-199] Q. When you spoke to Mr. Harlow, were you seeking advice as to the reaction on the Hill to reorganization of the Department of the Air Force that would result in the abolition of Mr. Fitzgerald's job?

MR. VON KANN: Well, I do have a continuing objection. I would like you to know that that is an especially leading question, and my objection is doubly significant on that one.

Go ahead. I won't do it every time, Steve.

A. My recollection is that I did not discuss with him the matter of management and reorganization but just the situation as it related to Mr. Fitzgerald, the question of Congressional sensitivity to an interest in Mr. Fitzgerald, and the question of what his views would be on Congressional reaction should Mr. Fitzgerald be separated from the Air Force.

Q. I'd like to rephrase the last question if I could.

What sort of advice were you seeking from Mr. Harlow? A. I was seeking for myself and Mr. Laird his assessment of the impact, potential impact, of [3-200] separation of Mr. Fitzgerald from the Air Force; impact on, possibly, legislation.

Q. Was the response you received from Mr. Harlow in terms of instructions, directions, advice, or something else? What was it phrased in terms of?

MR. VON KANN: What were the other alternatives? You recited instructions . . .

MR. NIGHTINGALE: Instructions, directions, advice, or something else.

A. It was in the form of—and we've said several times in this deposition—of advice that, yes, that there were members of Congress who took considerable interest in Mr. Fitzgerald; that there was critical legislation; and that it would not be a good time to make a change of the sort I indicated.

Q. Did Mr. Harlow indicate that he was speaking for Mr. Nixon or on Mr. Nixon's behalf? A. As I remember it, Mr. Nixon did not come into the conversation.

Q. I'd like to refer you to Plaintiff's Exhibit 94, which I understand you've identified as a transcript of an oral history that you had a hand in. Specifically, Page 11. I'd like you to look at the paragraph that occupies the bottom of the page[3-201] there.

A. (Examines document)

Q. Now, the material in quotation marks—is that a direct quote of what Mr. Harlow said to you, or is it not a direct quote? A. Well, first of all, this was dictated in March of 74 some five years after the fact; and it really should not have been shown in quotes because I didn't write down, didn't have a transcript of our conversation. So I really said this more in colloquial terms; and it really should say, I guess, He said that I could see you have a problem. I don't remember now and I doubt that I could in '74 remember exactly what his words were.

Q. Could you tell us what the sense of the words were?

MR. VON KANN: Let me ask. "Sense of the words" that appear on Page 11 of Plaintiff's Exhibit 94?

MR. NIGHTINGALE: I'm sorry. I'd like to rephrase the question. I appreciate that.

Q. In the sense of the words that were used in the actual conversation itself with Mr. Harlow. A. Yes. I believe you're asking me what was [3-202] the sense of the sentence that's in quotes on Page 11.

And my answer would be that I've already discussed this, the second half of the sentence; namely, that this would not be a good time to separate Mr. Fitzgerald for political—the political situation is such on the Hill that it would not be a good time to separate Mr. Fitzgerald. And the, "Well, I see you've got a problem" indicated that he was sympathetic to our management problem.

Q. Did you draw any implication from Mr. Harlow that he was expressing a favorable view on your abolishing Mr. Fitzgerald's position later? A. No. He was quite noncommittal, I'd say, to the best of my recollection.

Q. When you spoke to Mr. Harlow in November, had you already executed the order to abolish Mr. Fitzgerald's position? A. Yes. The logs indicate that the order was signed on November 3; and the conversation with Mr. Harlow was, I believe, a day later.

Q. Was that decision, was your execution of that order in any way tentative on November 3?

[3-203] A. No. It was part of an overall plan of the Air Force to have a reduction in Force to a considerable pro position, namely, 10 percent of all part of a total plan.

Q. The decision was made as of that point? A. The decision had been made by the Air Force at that point.

Q. What were Mr. Lang's responsibilities within the Department of the Air Force? A. Well, first of all, he was in what we call the Secretariat. That was the civilian element

within the Air Force located in the Pentagon and included myself and the other Secretaries of the Air Force, general counsel. And there's a group of about four to 450 people.

And his responsibility was for the administrative functions of that group which included personnel administration but also included such mundane items as office allocation and telephone and all of the things that it takes for this group to work effectively.

Q. Did he report directly to you? A. I believe that he did.

Q. Did he keep you apprised of all the matters

* * *

[3-213] It appeared that there had actually not been an investigation, but it clearly confused the issue to have such a file.

Q. That was after you had signed the order abolishing Mr. Fitzgerald's position, is that right? A. Yes, that's right. That was several weeks afterwards.

MR. VON KANN: Just so the record is clear, what was the anticedent of that in that question what you said that was?

MR. NIGHTINGALE: Excuse me. I'll rephrase the question so there won't be any confusion.

Q. Your conversation with Congressman Moorehead occurred in the middle of November, is that right? A. I forget. I keep forgetting the date of that hearing; but it was the day before the hearing in front of the Joint Economic Committee, the committee that was chaired by Senator Proxmire.

Q. Okay. When you talked to Bryce Harlow on November 4, how did you describe the reorganization that you had previously approved? A. I don't really remember.

Q. Do you remember whether you explained the [3-214] purpose to Mr. Harlow of the reorganization? A. Well, it was for purposes of information, and I must have advised him that that involved abolishing Mr. Fitzgerald's job and that it was a reorganization to do two things: to reduce the cost, cut down the number of people in the Secretariat. and to improve efficiency.

Q. Is that the way you described the reorganization to Secretary Laird? A. I guess I have to say I don't know what you're referring to there—meetings or . . . But in general, yes, that was what I would have discussed with Mr. Laird.

Q. Did you ever indicate to Mr. Harlow that you were abolishing Mr. Fitzgerald's job because of his testimony on the C-5A? A. As I have said, I don't really remember the details of the conversation; but as I've indicated here we did not abolish his job for that reason.

Q. You don't remember telling Mr. Harlow that you were abolishing Mr. Fitzgerald position because he had testified regarding the C-5A? A. I don't remember discussing that matter with him, no.

[3-215] Q. And you didn't abolish Mr. Fitzgerald's position because of his testimony on the C-5A? A. This is a matter we've discussed here at great length, and I will just say once more that—as I said that at the end of, I think, our last session we had the day before yesterday, that or maybe some other time when I was here—at any rate that was not a factor that concerned me, the fact that certain testimony had been taken in the previous Administration.

Q. Where were the Civil Service Commission hearings taking place in 1973? A. In the Civil Service building. I can't remember the exact address; but it was about two or three blocks to the west of the White House, a couple of blocks north of Constitution Avenue.

Q. Am I right in understanding your testimony that you ate lunch at the White House during breaks in the first two days of your testimony? A. Yes, I think the log shows that I did and also maybe in the three days. I did have limited White House privileges as Secretary of the Air Force. It was possible for me to use the White House Mess; and it was very, very convenient to the hearing. I [3-216] didn't care to go take the time to go back to the Pentagon, nor did I want to suddenly get emersed in a lot of other matters. I wanted to have a chance to relax.

Q. Do you remember meeting anyone in the White House Mess on January 30? That was the first day of your testimony.

MR. VON KANN: Asked and answered.

A. My only recollection of any discussion there in the White House Mess was the one we've gone through here with Mr. Dean.

Q. Did you tell Mr. Dean that, based on what you had heard of the President's press conference, the President had to be mistaken? A. Yes, I believe I did. Again, it's hard to remember the details of a five-minute stand up conversation on the steps leading out of the Mess.

Q. Dr. Seamans, did you prepare your own correspondence in response to inquiries of Congress directed at the Department of the Air Force? A. No. There were a very large number of inquiries. They'd go directly—at least in most cases, they would go directly to Legislative Liaison Congressional Affairs, whatever you want to call it,

* * *

[3-219] job? A. Well, I felt basically that the White House shouldn't meddle in the affairs of agencies and departments of Government; meddle in the sense of getting into personnel actions, whether it be either the hiring of people or reorganization or whatever it might be. And, in particular, that this had been part of a total, important plan of the Air Force; and, having made the decision on what I felt was good and satisfactory and reasonable grounds, I didn't want to see it changed.

Q. Do you feel that you had more information on the factors that went into the reorganization than they did? A. Well, that, I guess, is the reason that I'm a believer in reasonably decentralized management—that those who are close to the personnel are bound to know more about the facts, and they're the ones that ought to make the decision.

Q. I'd like to refer you to Plaintiff's Exhibit 127 now. I'd like you to look at the bottom of the column that appears under the headline, "Official Score Reporting on C-5A Overruns. A. On Page 3 or—

* * *

[3-226] of his assistants?

A. I don't remember.

Q. Did you indicate to Mr. Dean that you thought the President made a mistake? A. Yes, I believe I did. I would have been remiss if I hadn't.

Q. Do you know what position Mr. Buzhardt was in before he moved over to the White House? A. Yes. He was the general counsel for the Department Defense.

Q. Have you had a chance to consider when Mr. Buzhardt changed jobs? A. No, I have not.

Q. Do you know whether he was at the White House prior to your Civil Service Testimony? A. No, I really don't know. I think there's some relationship between Mr. Dean leaving the White House, isn't there, and Mr. Buzhardt being over there? I'm not really sure of that. That's speculation.

(Discussion off the record)

Q. Dr. Seamans, did you consult with anyone at the White House in preparation for testifying before the Civil Service Commission? [3-227] A. Not that I can recall.

Q. Did anyone instruct or advise you that you should refuse to speak about conversations you may have had with White House staff members? A. No.

MR. NIGHTINGALE: I believe that's all I have.

(Discussion off the record)

CROSS EXAMINATION

BY MR. LANDMAN:

Q. Dr. Seamans, just picking up on something that Mr. Nightingale just asked you about, would you state whether or not you have ever had any doubt as to whether former President Nixon misspoke on January 31, 1973, when he said,

without characterizing exactly what he said, that he approved of the decision to abolish Mr. Fitzgerald's job?

MR. VON KANN: Well, I object; and I'll just have a standing objection to any leading questions from Mr. Landman of his own client. But go ahead.

MR. LANDMAN: I don't think that's leading.

MR. VON KANN: I thought it was, but let

* * *

[3-234] qualifications.

Q. Dr. Seamans, would you tell me whether or not you rejected Mr. Nielson's proposal to reorganize the Office of Financial Management? A. Yes, I did. And the reason was that we were planning to bring in a new Assistant Secretary for Financial Management, and it seemed best to have the new Assistant Secretary review the organization and come in with recommendations for possible changes in procedure and organization.

Q. Dr. Seamans—A. Excuse me. I would say because the new Assistant Secretary would be the one who would have to take the responsibility for the office, and it only seemed proper that this individual would be involved in any changes that were made.

Q. Dr. Seamans, based on your May 9, 1969, conversation with either Mr. Harlow or Mr. Alexander, was it your impression—I'm sorry. Strike that.

Based on your conversation with Mr. Harlow on May 9, 1969, was it your impression when Mr. Harlow said he would get back to you that he was going to check with people on Capitol Hill or that he was going to check with people in the White House

* * *

[3-240]Q. My question to you is whether you have ever learned, whether or not you have ever learned, that anyone on the White House staff caused that file to be compiled. A. That

never to my knowledge, never came to my attention. The first time that that thought has crossed my mind.

Q. The first time that thought has crossed your mind is when? A. Now.

Q. Okay.

MR. VON KANN: When you suggested it.

Q. Dr. Seamans, have you ever learned of any contact between Mr. Butterfield and the Air Force or Department of Defense with regard to Mr. Fitzgerald? A. No.

Q. Would you tell me whether or not you've ever learned of any action by Mr. Butterfield which influenced how Mr. Fitzgerald was treated by the Department of Defense or the Air Force? A. The first time that I knew or learned that Mr. Butterfield had, in any way, been involved in the matters of Mr. Fitzgerald was when I read the partial transcript of the Nixon tapes or saw a memo.[3-241]I forget which it was. Maybe it was a memoranda or something from the White House, but I knew nothing about it when I was in the Air Force.

Q. I'd like to show you, Dr. Seamans, Plaintiff's Exhibit 71 and just ask you to read the first paragraph. Or maybe you don't need to read it; you might be familiar with it now.

My question is would you tell me what your impression was of what Dr. Brown—and I'm only asking for your impression—of what Dr. Brown meant in terms of Mr. Fitzgerald's unacceptable practices.

MR. VON KANN: Well, let me object to that. The witness has previously testified that that exhibit is, to the best of his recollection, an accurate summary of his meeting with Dr. Brown with one exception which he explained. I don't see how the witness can explain what Dr. Brown meant better than Dr. Brown has.

MR. LANDMAN: Only his impression of what Dr. Brown meant, what he viewed Dr. Brown meant when he used those words or words to that effect.

MR. VON KANN: Okay. A. I can't of this date, of course, try to [3-242] guess what Mr. Brown had in mind; but I

know what my own reading of this means right now—that there is a time when decisions are being made, when you want the advocates of different viewpoints to present them vigorously and forcefully and clearly; and that's very appropriate, that is, before the decision is made. But you don't want public positions to be taken on from contrary standpoints after the fact in the public arena.

Q. This is my last question.

Dr. Seamans, would you tell me whether or not Mr. Harlow ever gave you any indication during the time period of your two May 1969 conversations with him—I believe May 9, 1969, and May 15, 1969—whether or not Mr. Harlow ever gave you any indication or advice as to what you should do in the future about Mr. Fitzgerald? A. As I've stated quite a few times here in these three sessions, to the best of my knowledge he did not make any recommendations as to the actions we should take; rather, he advised us of the sensitivity of the matter on the Hill and thought that it would not be in the Administration's best interest to take action at that specific time to [3-243] separate Mr. Fitzgerald from the Air Force.

Q. Thank you.

MR. VON KANN: Dr. Seamans, I have, hopefully, a quick follow up.

REDIRECT EXAMINATION

BY MR. VON KANN:

Q. Mr. Nightingale asked you about Plaintiff's Exhibit 76; and Mr. Nightingale asked you, I believe, if you knew what was the source of information contained in that document.

And I want to ask you if it might refresh your recollection that you compiled Plaintiff's Exhibit 76 upon reviewing Mr. Schedler's testimony before the Civil Service Commission. A. Of course, I was putting this information—there are several sheets that we've gone over here—together, and I had a great stack of data.

And I'm sure that in that stack there were a variety of notes; and I guess I had—I don't know. I don't think I used, as I said, my log; but I'm pretty sure that if you went through all the data in front of me you could pull this information out as to when I first met Schedler.

Q. No, sir, my question is more narrow than

• • •

Excerpts From The Deposition of
Ronald A. Ziegler (R. 442)
[pp. 100,105-06]

[100] A. It is based upon the similarity of language and position, therefore, on my part.

Q. And nothing other than the similarity of language? A. Nothing other.

Q. You described for us your state of mind as to a Magruder memorandum that was shown to you. Do you have any—what was your state of mind, if any, concerning communications from Mr. Butterfield? A. Well, Alex was really not that big of a factor. He was a paper flow guy, and I had little contact with Butterfield, and he would not have been a primary source of information for me on press briefings.

* * *

[105] Write this. Would you explain very briefly what you meant by "natural" for Allen Woods to write this? A. Well, not only Allen, but members of the staff who—I guess—well, in reviewing the press conference, President's press conference from the—

Q. Can I help you? December 8, 1969? A. —December 8, 1969.

Q. Questioned by? A. Questioned by Sarah McClendon, he did not respond. I think there was a joke or something. That very likely would have been the reason why Allen would have written this, which would have been a natural course of events.

Q. Follow-up? A. Follow-up.

Q. I believe you testified that Mr. Butterfield was a "paper flow guy" to use your words. Are you aware of any usage of Mr. Butterfield by your staff, if there was any, to follow up on loose ends before a press conference in order to make sure that the administrative work was done, to make sure a position was taken on the matter? A. I'm not aware of that. It could have happened, but again, I don't believe Butterfield would have been an individual [106] that would have prepared substantive matters for a press conference.

* * *

Plaintiff's Deposition
Exhibit 4A

Congress of the United States
House of Representatives
Washington, D.C.

November 7, 1969

The President
The White House

Dear Mr. President:

The Defense Department dismissed a conscientious public servant when they fired A. Ernest Fitzgerald on November 4. Mr. Fitzgerald for the past four years has worked assiduously to reduce waste and inefficiency in weapon systems procurement, which annually consumes in excess of $20 billion of taxpayers' money. Defense Department officials have explained Mr. Fitzgerald's dismissal as an "economy move." What an incredible irony when a man who has identified billions of dollars of waste, is fired to save money. At best they have been penny-wise and pound foolish.

More than likely, however, the firing of this dedicated public servant was a punitive action—taken because he refused to knuckle under and rationalize the waste, inefficiency, and bureaucratic bungling he came across. It has been said that he who makes waves in the bureaucratic maze of the Pentagon will often drown in them. Unfortunately, this has been all too real in the case of Mr. Fitzgerald.

Honesty and candor exhibited by public servants without fear of reprisal must remain a keystone to good government. Therefore, we call upon the Administration to repudiate the type of punitive action that was taken against Mr. Fitzgerald and restore him to his former duties.

Sincerely,

WSM:ymm

Plaintiff's Deposition
Exhibit 12

THE WHITE HOUSE
Washington

January 20, 1970

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: MR. HALDEMAN
FROM: ALEXANDER P. BUTTERFIELD /A/
RE: A. Ernest Fitzgerald

I may be "beating a dead horse" at this late date . . . but it was only a few days ago that Alan Woods called to ask if we had arrived at any particular Administration line regarding Mr. A. E. Fitzgerald. And someone else (I can't remember who) asked the same question at about the same time.

You'll recall that I relayed to you my personal comments while you were at San Clemente, but let me cite them once again—partly for the record—and partly because some of you with more political horse sense than I will probably want to review the matter prior to next Monday's press conference.

— Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.

— Last May he slipped off alone to a meeting of the National Democratic Coalition and while there revealed to a senior AFL-CIO official (who happened to be unsympathetic) that he planned to "blow the whistle on the Air Force" by exposing to full public view that Service's "shoddy purchasing practices". Only a basic no-goodnik would take his official business grievances so far from normal channels. As imperfect as the Air Force and other military Services are, they very definitely do not go out of their way to waste government funds; in fact, quite to the contrary, they strive continuously (at least in spirit) to find new

ways to economize. If McNamara did nothing else he made the Services more cost-conscious and introspective—so I think it is safe to say that none of their bungling is malicious . . . or even preconceived.

— Upon leaving the Pentagon—on his last official day—he announced to the press that "contrary to recent newspaper reports" he was not going to work for the Federal Government, but instead, was going to "work on the outside" as a private consultant.

— We should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part.

— We owe "first choice on Fitzgerald" to Proxmire and others who tried so hard to make him a hero.

cc: Mr. Ehrlichman
Dr. Kissinger
Mr. Klein
Mr. Colson
Mr. Nofziger
Mr. Magruder
Mr. Ziegler

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Excerpt From Plaintiff's Deposition
Exhibit 19
[pp. 8-9]

QUESTION: Mr. President.

THE PRESIDENT: Mr. Mollenhoff.

QUESTION: Did you approve of the use of executive privilege by Air Force Secretary Seamans in refusing to disclose the White House role in the firing of air cost analyst Fitzgerald?

It came up yesterday in the Civil Service hearings. He used executive privilege. You had stated earlier that you would approve all of these uses of executive privilege, as I understood it, and I wondered whether your view still prevails in this area or whether others are now entitled to use executive privilege on their own in this type of case?

THE PRESIDENT: Mr. Mollenhoff, your first assumption is correct. In my dealings with the Congress—I say mine, let me put it in a broader sense—in the dealings of the Executive with the Congress, I do not want to abuse the executive privilege proposition where the matter does not involve a direct conference with or discussion within the Administration, particularly where the President is involved. And where it is an extraneous matter as far as the White House is concerned, as was the case when we waived executive privilege for Mr. Flanigan last year, as you will recall, we are not going to assert it.

In this case, as I understand it—and I did not approve this directly, but it was approved at my direction by those who have the responsibility in the White House—in this case it was a proper area in which the executive privilege should have been used.

On the other hand, I can assure you that all of these cases will be handled on a case by case basis and we are not going to be in a position where an individual, when he gets under heat from a Congressional committee, can say, "Look, I am going to assert executive privilege."

He will call down here, and Mr. Dean, the White House counsel, will then advise him as to whether or not we approve it.

[9] QUESTION: I want to follow one question on this.

THE PRESIDENT: Sure.

QUESTION: This seems to be an expansion of what executive privilege was in the past and you were quite critical of executive privilege in 1948 when you were in the Congress—

THE PRESIDENT: I certainly was.

QUESTION: You seem to have expanded it from conversation with the President himself to conversation with anyone in the Executive Branch of the Government and I wonder can you cite any law or decision of the courts that supports that view?

THE PRESIDENT: Well, Mr. Mollenhoff, I don't want to leave the impression I am expanding it beyond that. I perhaps have not been as precise as I should have been. And I think yours is a very legitimate question because you have been one who has not had a double standard on this. You have always felt that executive privilege, whether I was complaining about its use when I was an investigator, or whether I am now defending its use when others are doing the investigating—I understand that position.

Let me suggest that I would like to have a precise statement prepared which I will personally approve so that you will know exactly what it is. I discussed this with the Leaders and we have talked, for example—the Republicans, like Senator Javits and Senator Percy, are very interested in it; not just the Democracts, and I understand that. But I would rather, at this point, not like to have just an off-the-top of my head press conference statement delineate what executive privilege will be.

I will simply say the general attitude I have is to be as liberal as possible in terms of making people available to testify before the Congress, and we are not going to use executive privilege as a shield for conversations that might be just embarrassing to us, but that really don't deserve executive privilege.

QUESTION: The specific situation with regard to Fitzgerald, I would like to explore that. That dealt with a conversation Seamans had with someone in the White House relative to

the firing of Fitzgerald and justification or explanations. I wonder if you feel that that is covered and did you have this explained to you in detail before you made the decision?

THE PRESIDENT: Let me explain. I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me.

No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it.

* * *

Plantiff's Deposition
Exhibit 25

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

February 1, 1973

MEMORANDUM FOR MR. DAVID WILSON
THE WHITE HOUSE

This will confirm our discussion of earlier this afternoon.

Our records indicate that Dr. Seamans discussed the Fitzgerald matter with Bryce Harlow on the following occasions:

May 9, 1969—Phone conversation

May 15, 1969—Discussion (This occurred at a White House breakfast where they met by chance

November 4, 1969—Phone conversation (Note: The official document abolishing Fitzgerald's job was signed November 3, 1969 to be effective January 5, 1970. The press and Fitzgerald were notified of the action on November 4th.

December 5—Phone conversation (Note: On December 5th, Dr. Seamans also had a phone conversation with Clark Mollenhoff.)

I have not been able to reach Spence Schedle, however, I have ascertained that he met with Clark Mollenhoff sometime after the decision was made probably in late November or December. I will confirm date tomorrow.

/JACK/
Jack L. Stempler

Plaintiff's Deposition
Exhibit 26A
[Entire exhibit is handwritten]

Jim Akins 2777
4 year term — Get back to Seevers re impoundment

HARLOW—

1) What was gist of conversations in May

2) Anybody also talk with Seamans or DOD before Nov. 4

3) Any objection to testimony in this regard—no [illegible]

4) Position at that time was Counsellor to the P

STEMPLER

On May 5, 1969 Nielsen had written memo on reorgan

6 & 7 — Laird & others testified

On 9th of May Seamans called Harlow at that time

on 15 ran into Harlow at prayer breakfast

HARLOW

May 15 — Seamans told him he was going to do it & wanted counsel as to timing & how to procede

2603
Correspondence

Plaintiff's Deposition
Exhibit 45

September 5, 1973

Memorandum for conversation with Melvin Laird, Special Assistant to the President, on the A. Ernest Fitzgerald case.

In commenting on the Watergate matter on August 29, 1972, President Nixon said: "What really hurts in matters of this sort is not the fact that they occur, because overzealous people in campaigns do things that are wrong. What really hurts is if you try to cover it up."

President Nixon has had agony in the last six months because of his failure to detect evidence that I, and many others, have tried to warn him about. He has also had a host of problems flowing from his administration's failure to take necessary steps to reinstate Mr. A. Ernest Fitzgerald in government after the wrongful discharge, "smears", and pattern of perjury and falsification by the Air Force had been pointed out to him and his top White House advisers.

There are many reasons for correcting the Fitzgerald case with direct presidential action which would take it out of the hands of Chief Hearing Examiner Herman Staiman. Some of the reasons involve "good politics", but to avoid any misunderstanding on the priority of the reasons I will list them in the order of their importance:

1. It is the right and decent thing to do. It is the quickest way to right a grevious wrong, and the only way that Fitzgerald can receive substantial justice without a longer ordeal. He has already been subject to a four-year persecution that is earmarked with evidence of vindictive, malicious actions for telling the truth on the C-5A overruns in November, 1968.

2. It is the legal thing to do. The reduction in force action was contrived to get rid of Fitzgerald because he displeased his superiors. There are laws that bar firing of government employees for telling the truth to Congress about questionable government operations.

3. It is the only thing to do to avoid implication in a criminal obstruction of justice for being a party to a cover-up of

the provable perjury, falsification of records and other law violation that have been a part of the Fitzgerald case and the C-5A affair. It is as dangerous as Watergate, for there would be little chance for denial of knowledge of proof that has been on the public record for months in various forms.

4. Correcting the case quickly will avoid involvement of many of the key figures in a multi-million-dollar law suit that Fitzgerald's lawyers are planning in connection with the violation of Fitzgerald's rights through malicious persecution and perjury. His lawyer, John Bodner, Jr., is expert in this kind of damage suit and feels he has the evidence to win.

5. Correcting the case before the Civil Service ruling can win President Nixon some credibility and some much-needed good will at a crucial time. Permitting the Fitzgerald case to stand until corrected by the Civil Service Commission or the Federal courts places the White House and the President in a position of "not giving a damn" for justice and the righting of wrongs. Such a course will only create further damage to the credibility of President Nixon and all others who can be associated with the case.

There are examples of why it is best to correct the wrongs and not let them fester:

The Otto Otepka case with its illegal wiretapping, admitted perjury, and destruction of records, will be a permanent blot on the record of Secretary of State Dean Rusk.

The Wolf Ladejinsky security case became a plus for President Eisenhower and Agriculture Secretary Ezra Taft Benson when it was corrected despite long delays in taking the corrective steps. It won them universal editorial praise for being "big men".

The Gordon Rule case was corrected quickly and the decision was praised. There has been no continued criticism of the case, and if anything about it is mentioned the rapidity of the corrective action is noted.

The Fitzgerald case has been a source of pain for the Nixon administration for four years and is destined to be a

problem for as long as it is not corrected. A final ruling for Fitzgerald in the Federal courts is as inevitable as the ruling he was entitled to an open hearing.

If there are those who believe that it will be wise to delay a decision until the last, and then disregard the orders of the court, I would suggest that this involves many political hazards that I would think the administration would seek to avoid.

It is best to leave the job offer conversations as "a misunderstanding". Fitzgerald says there were conversations about a job but that he never was offered a job that he rejected. He says that he left it with the understanding that Laird would contact him, or would have someone also contact him, with regard to a specific position. No contact was made, and after that a number of actions were taken by the Air Force that were inconsistent with a good faith effort to reinstate Fitzgerald. He assumed that Laird knew or approved the circumstances of these actions, and had no further contact on the job.

All that is needed in public life is one real provable wrong on a case that is clear and understandable and it can wipe out a pattern of good effective work.

Proxmire is on the right side on the Fitzgerald case and the only wise thing Laird can do is join him.

There should be no need for further discussion of the posture of the case, unless there is some question about the depth of proof on the perjury, subornation of perjury, falsification of records of general malicious conduct of various Air Force officials. In that event, I can explain or submit a written bill of particulars.

Clark R. Mollenhoff

Plaintiff's Deposition
Exhibit 59

The White House
Washington

[E HAS SEEN; RETURNED FOR YOUR FILES]
January 31, 1973

MEMORANDUM FOR THE PRESIDENT

THROUGH: JOHN EHRLICHMAN

FROM: JOHN DEAN /JD/

SUBJECT: Secretary Seamans' Refusal to Testify in the Fitzgerald Case

Yesterday, during the Civil Service Commission hearing on the dismissal of A. Ernest Fitzgerald, Air Force Secretary Seamans cited "executive privilege" as a reason for refusing to answer certain questions by Fitzgerald's attorney. Although we have not been able to examine the transcript of the testimony, this rationale was apparently used several times in response to questions concerning communications or consultations with members of the White House staff. Secretary Seamans was trying to prevent disclosure of the fact that he had discussed the Fitzgerald case with Clark Mollenhoff and Bryce Harlow while they were still on the staff.

For your general background, the assertion of executive privilege in judicial preceedings, unlike executive privilege vis-a-vis the Congress, is not uncommon and has basically been recognized by the courts as an evidentiary privilege rather than a constitutional principle. Under the established procedure, before a formal claim of judicial executive privilege is lodged, there must be consultation with a committee established in the Civil Division of the Justice Department and then, if necessary, final clearance by the Attorney General. Of course, in any case in which there is a White House interest, the Attorney General consults with me.

The normal situation in which claims of judicial executive privilege arise involve discovery efforts to obtain governmental documents which are either classified or an integral part of the decisional process. The procedure in these cases is to first exhaust all other possible evidentiary privileges, such as those relating to intergovernmental advice and recommendations, and then if these fail, to formally assert the privilege. Such a formal claim of privilege must be made in accordance with the procedures described in *United States* v. *Reynolds*, 345 U.S. 1(1953). That case restricts a claim of privilege to the head of a department or agency and requires that it be premised upon his personal inspection of the documents. It should be noted that *Reynolds* directly applies only to documentary evidence rather than testimonial evidence, but logic would demand extension to cover both.

The situation in the Fitzgerald case differs from the normal instance in which judicial executive privilege would be claimed because this Civil Service Commission proceeding, albeit a quasi-judicial proceeding, is entirely within the Executive Branch. Formal invocation of the privilege would not be proper in this circumstance. Instead, the witness would merely decline to testify about the privileged matters. If Fitzgerald's attorneys were to ultimately appeal the decision of the hearing examiner to the courts, then it would be proper to formally invoke executive privilege in accordance with the *Reynolds* doctrine.

The statements made by the President at the press conference this morning (attached at Tab A) do not conflict with the above interpretation of Secretary Seamans action, but will require further explanation by Ron Ziegler. The President explained that he did not approve a claim of privilege directly in the Fitzgerald case, but that it was approved by those who have the responsibility in the White House for these matters and was a proper area in which the privilege should have been used.

The President's statement is true in that I have generally explained to the Department of Justice and General Counsels

of the departments and agencies that judicial executive privilege can be properly invoked in situations involving possible disclosure of agency consultations with the White House. In this case, although it was not yet timely to invoke executive and Secretary Seamans did not do so, a formal claim of privilege will be approved if the issue ever reaches the courts. In the meantime, Secretary Seamans properly declined to testify as to such matters which later might be covered by an assertion of executive privilege.

The other point in the press conference which should be clarified relates to your statement that you approved the decision to fire or discharge Mr. Fitzgerald. Actually, Fitzgerald lost his job in a bona fide reorganization of the Department of the Air Force. The President approved this reorganization in the full knowledge that it would result in the elimination of Mr. Fitzgerald's job and, therefore, be the subject of great controversy. This action, in colloquial terms, has been referred to as a "firing", but is in truth the elimination of a job position in the course of a governmental reorganization that was essential to the improved efficiency of governmental operation. Of course, the central issue of the Fitzgerald case is this very point: whether Fitzgerald's dismissal was in effect an adverse personnel action arising out of a reorganization adopted solely in order to fire him or whether the elimination of his job position arose from a bona fide reorganization.

Plaintiff's Deposition
Exhibit 71

January 9, 1969

MEMORANDUM FOR THE RECORD

SUBJECT: Discussion with Secretary of the Air Force-designate Robert Seamans, January 9, 1969

On this date Dr. Seamans and I had two discussions, each lasting for about an hour and a half. Two of the subjects discussed were: (a) Mr. E. A. Fitzgerald and (b) the C-5 aircraft.

(a) With respect to Mr. Fitzgerald, I pointed out that, though some of his ideas about procurement practices and financial control of contractors had merit, his practices were unacceptable. These include speaking to the press against Air Force decisions, discussing internal Air Force matters with Congressional Committee staffs, and providing them with documents without going through Legislative Liaison channels. This behavior has greatly lessened, if not eliminated, his value as an employee of the Air Force. I drew the distinction between advocating one's views vigorously within the Department before a decision was taken, and public non-support, or volunteering and advocating contrary views to the press and the Congress.

I indicated that his actions up to now probably do not constitute sufficient reason for us to take removal action against Fitzgerald, but that we would act to make it clear to Fitzgerald that we considered his usefulness to the Air Force to be negligible if not negative. In the interest of discipline it was important that the new Air Force Secretariat take a similar position in subsequent months. Dr. Seamans indicated that he understood this principle and that, in the light of the facts that I had described, he recognizes that Fitzgerald is of no use to the Air Force; though his rights must be protected, he is to be discouraged from remaining.

(b) I described to Dr. Seamans the C-5 technical progress and its satisfactory performance, and contrasted them with the financial problems of the C-5. I said that we were convinced that we should buy a 4th squadron of the C-5 despite the cost increase, but that the Government should retain freedom not to buy a 5th or 6th squadron depending on further review and further cost history. I outlined the contractual arrangements on the 4th, 5th and 6th squadrons which I felt the Air Force and Lockheed could agree on. Dr. Seamans indicated that it was very desirable that the decision on whether or not to exercise the option, which expires on January 31, be taken before January 20, so that Mr. Laird would not be faced with a difficult problem, new to him, with only ten days to make a decision. I agreed that it would be very desirable to have the decision made and executed before January 20, and said we would make every effort to do so.

Dr. Seamans and I agreed that, in view of his problems of disengagement in Cambridge, I would stay on as Secretary of the Air Force until February 15th. The question of how to handle the weekend between February 15 and February 17 was left for further discussion.

Harold Brown

cc: Dr. Seamans

Excerpt From Plaintiff's Deposition
Exhibit 84
[pp. 4-6]

Q. Ron, do you have any further information on the Fitzgerald matter? MR. ZIEGLER: Well, I did, but I wanted to volunteer that and not respond to your questions.

Q. I withdraw the question. MR. ZIEGLER: Adam Clymer asked a question this morning regarding the Fitzgerald matter and I had said the President mentioned briefly to me this morning that he wanted to discuss that with me further. I have had a chance to talk to the President about it.

He indicated to me that after reading the transcript of yesterday's press conference that he was mistaken in his reference to Mr. Fitzgerald and the fact of the matter is that the President did not, as indicated yesterday in the press conference, have put before him the decision regarding Mr. Fitzgerald.

We can find no record—the President requested that a check be made of this—of the matter ever being brought to the President's attention for a decision.

So the decision regarding the reorganization that took place in the Air Force, which dealt with Mr. Fitzgerald, was a matter dealt with solely by the Air Force.

The question, as you recall, yesterday was a complex question related to the area of Executive privilege and the follow up question, I believe, related to Mr. Fitzgerald. And the President, as he said to me, misspoke himself in response to that question and wanted me to clear that up at the soonest possible opportunity. As I mentioned to you, he said early this morning that he wanted to talk to me about it and I have had a chance now, following the meeting, to talk to him about it and he asked me to convey this information to you.

Q. If the President did not deal with it, as you say, what is the basis for Air Force Secretary Seamans' claim of Executive privilege at the Civil Service Commission hearing? MR. ZIEGLER: Mr. Seamans' claiming Executive privilege at the Civil

Service hearing relates to the fact that that was a matter dealing with a situation which falls totally within the Executive Branch and in that case the situation that existed differs from the normal invocation of Executive privilege, such as that which would occur before Congressional committees. It deals with the fact that you have privileged information regarding an exchange of information or a seeking of advice from a member of the Executive Branch, from a member of the White House staff, and that is the basis on which he informally invoked Executive privilege.

[5] Now if this case was ever taken before a formal judicial body, then if Executive privilege would be invoked then it would have to be invoked on a formal basis.

As you recall, the President, in his response to the question yesterday, stated that he did not directly invoke Executive privilege in relation to the Civil Service hearing, and this is normal procedure in an instance that deals with privileged information in exchange between members of the Executive Branch while it is an in-house matter.

Q. Am I not right, hasn't this been before a judicial body and they came back and said the Civil Service had to have open hearings on it and how can you possibly excuse the use of Executive privilege when the President didn't give his permission? MR. ZIEGLER: That is the very point, Sarah. The element of Executive privilege was invoked in a hearing that fell within the category of the Executive Branch. If it moved from that particular hearing setting to a formal judicial body, then if Executive privilege was invoked, it would have to be formally invoked.

Q. Based on what you know of this case, would this be a proper subject for formal Executive privilege in the event that you say? MR. ZIEGLER: I can't draw a judgment on that at this point.

Q. Could I ask one more question? If the President was not referring to Ernest Fitzgerald as the person he ordered dismissed and he will stand by that, who was he referring to?

MR. ZIEGLER: We talked about that and he said he simply misspoke himself and should have applied "not" instead of the affirmative in which he replied.

Q. Did he say who he had in mind? MR. ZIEGLER: No, he did not.

Q. Did the Air Force complain yesterday afternoon or this morning from the President's assertion that he had approved the firing which the Air Force maintains is not a firing? MR. ZIEGLER: No, they did not complain. It is not a matter of the Air Force complaining. It is a matter of the President reviewing the transcript. Yesterday evening, as he said, he was working on his remarks for the event this morning, the Prayer Breakfast, and preparing for the Heath meeting today and during the course of the evening following the Sato dinner last night, he reviewed the transcript and noted the details of his response and simply found that he had a question about that particular answer, and discussed it this morning and asked me to convey the fact that he misspoke himself.

[6] Q. Anything else you want to correct in that transcript? MR. ZIEGLER: No, as a matter of fact, I think this is the first time I have corrected something in four years in a Presidential press conference transcript because this is the first instance in which he has asked me to do so.

Q. Ron, does the President regard Mr. Fitzgerald's case as a firing? MR. ZIEGLER: The President's point of view about the Fitzgerald case is one that I don't think I should formally express. The Fitzgerald matter is a situation that was dealt with within the confines of the Air Force and the Defense Department.

Q. In view of all the publicity on this thing that Mr. Fitzgerald got yesterday, are you going to notify the Civil Service Commission that you really didn't mean Fitzgerald so Mr. Fitzgerald won't get a worse name? MR. ZIEGLER: Well, I think the fact that we are stating this publicly, Sarah, is something that will be rapidly called to their attention.

Q. Ron, in the check that you had made, was it determined whether or not the Fitzgerald matter was brought before anybody on the White House staff at the time? MR. ZIEGLER: The check we had made was to determine whether or not—and this has been some years ago, as you all know—in any form at all, in writing or in any other way that it could have been brought to the President's attention and that check indicated that it was not.

Q. But did it come before anybody on the staff here? And was the decision made there? MR. ZIEGLER: I am not aware of that.

* * *

Excerpt From Plaintiff's Deposition
Exhibit 94
[pp. 1-15]

The following transcript is a supplement to a series of oral-magnetic-taped interviews conducted by the Air Force with Robert C. Seamans, during September 1973, November 1973, and March 1974. The portion covered in these pages was tape recorded on 13 March 1974 by Mr. Hugh N. Ahmann of The Albert F. Simpson Historical Research Center.

A: Was this following a pattern of other presidential—IRS and different agencies were becoming more and more . . . ? S: Sure. Every agency in the department. You've got (Alexander P.) Butterfield, a colonel in the Air Force, to be sure. He was very close to Haldeman. He (Butterfield) was in charge of all those tapes and everything, after all, over there. He ends up being administrator of the FAA. (Egil) Krogh, Undersecretary of Transportation, Deputy Secretary, whichever it is. I mean it was just happening everywhere.

A: Would you want to address Ernest Fitzgerald at all? S: Sure, we can talk about that a little bit if you'd like. I don't know what the final answer is going to be, but I'll just give you a little summary of it if you'd like. I guess we haven't discussed it up until now.

[2] A: No, we really haven't. I mean like the question is, obviously, was he fired, or was his job eliminated to have him fired, that whole area. S: Just for the historical record, if you want to really dig into it, I had to go before the Civil Service Commission examiner for three full days and be asked questions by the legal profession and the Civil Liberties Union. I'll tell you those were tough proceedings, all in public. So it's all on the record. What I'll say is sort of in addition to all that factual information that's all there.

I never heard of a guy named Ernie Fitzgerald until either the last week in December or the first week of January 1969. By then I had agreed to join the Air Force and starting as of 15 February. I had a lot of stuff to clean up in New England, not

just at MIT but other things as well. I was trying to get together with Harold Brown and get familiar with the job by putting in maybe one or two days a week during that six-weeks period. I'm sure it was on my first session with Harold Brown that he brought up the C-5 and Ernie Fitzgerald. I didn't know much about the C-5 either really, [3] although I had heard of the airplane and so on. Harold was faced with a decision of whether to exercise one of the options to go ahead with the preliminary work on an additional—I guess it was—25 aircraft, which took the total number up to I guess, what?, 57 to 81 or whatever that number was. And it was an option that they felt they ought to pick up prior to the inauguration. I was trying to stay in the posture with him of, "I'm glad to hear about these things so when I have the responsibility I'll know about them. But don't go on the basis of my views. You're the Secretary of the Air Force now. These are your decisions."

As time went on after that, I was sort of glad I had made that quite clear, not because Harold ever tried to say, "Well, Bob Seamans agreed to it," but others in front of Congress and everything sort of would say, "Well, didn't you know about this before you were sworn in?" and all of that. I'd say, "Yes, I was acquainted with what the issues were, but I had no part in the decisions."

At that very first meeting he told me a little bit about a guy named Ernie Fitzgerald, and I'm pretty sure that by then that [4] Proxmire had written me a letter through the Air Force office, quite a long letter. It talked about this "wonderful public servant." First, he congratulated me on becoming Secretary of the Air Force and then talked about this "wonderful public servant" and was glad that I was coming in because he was sure that I'd need the services of this "wonderful public servant" and would want to rely on him heavily because he was one of the "greatest public servants" that had ever come down the pike. So I wrote him back a short letter and said, "Thanks very much, and I'll look into this matter when I become Secretary of the Air Force." The facts of the matter are that Ernie did testify on the C-5; that he was certainly not encouraged to do so; that this was bigger than just the Air Force. I guess Bob Moot and others got

into it, didn't want him to testify on the thing. Between Fitzgerald and Proxmire, they were "coony" enough to make it well-known publicly that he was up there testifying even though the Defense Department hadn't wanted him to. Of course, that made it all the more exciting and everything appeared more valid and the Air Force and DOD looked more like conspirators deceiving the public. Then, of course, a few strange things happened in the Air Force, the most amazing being the memo that John Lang (of Personnel) wrote to Harold Brown on three ways for separating Fitzgerald from the [5] Air Force. One was to fire him for cause; one was to abolish his job; and the third one, which he said would be a little deceitful, would be to—and I can't remember what the third one was offhand, but it's all in the memo. It took about 24 hours from the time that Lang wrote the memo until Proxmire had the memo. There's no question in my mind that there was a very good set of information points that Ernie had over there with secretaries for knowing what was going on. A lot of strange things have happened, but they're not germane really, and they're all in the record.

After being sworn in and wrestling with a few of the immediate questions, such as should we go ahead with another 255 FB-111's or start on the B-1?, I got around to Ernie Fitzgerald. And I found that (Tom) Nielson, who was his boss, was very upset about him and kept wanting to come in and talk to me about it. He actually wrote into the record in December or January that he had reached the conclusion that Ernie had to go for the good of the Air Force. So I may not have been smart, but I think I did what you sort of do naturally, and I know this is what John McLucas has tried to do since, without have it very satisfactory.

[6] I invited him to come in and chatted with him, and I tried to size him up. I tried to get across the message to him that if his interest was really in doing a better job managing major programs and keeping the cost down and so on, I'd like to work with him on it. But if his interest was in getting publicity and trying to shoot the Air Force down and to be

generally obstructive, then he ought to consider leaving. You know, he had to make up his own mind which way he wanted to go, and that's the way it was left.

I wasn't terribly impressed with him as a manager and administrator. He was obviously a man who was very limited. His experience was not in managing programs. His experience was in developing management systems. That's his whole background until he got into all this publicity arena. Of course, he's terribly good at playing the southern boy from Alabama, the country boy taking on the big corporations and all these big money spenders and the generals—the "High Priests of Waste." Then as time progressed and Nielson kept wanting to come in and get his office reorganized with an idea that Ernie's job wouldn't be there anymore.

[7] By then I knew I was going to get a new Assistant Secretary of Financial Management. I couldn't really see making an organizational change in that office and then changing the Assistant Secretary. I mean that was the wrong order to do things in. I guess it was in March I was starting to interview people for that job. I guess Schedler agreed to come in April. By the time the clearances went through and he was sworn in and available and everything, it was May. The first order of business for him was to see how to do a better job of Financial Management and to see how we were going to work with Ernie Fitzgerald. At the time that I was talking to Schedler, I hadn't completely made up my mind as to whether Fitzgerald was a lost cause or not. But in May I was quite certain that Fitzgerald should leave the Air Force for his good and ours.

In the first week of May I got information that there was a lot of Air Force material that was being used by Congressman (Wm. S) Moorehead (D-PA) on the Holifield Committee and this was being supplied by Ernie Fitzgerald. That was by a guy named (Herb) Roback. He is the key staff guy up there on the Holifield Committee, and the Holifield Committees, The Joint Operations [8] Committee is a key committee. He also indicated that Ernie was up there a great deal, that he was

conducting seminars for other staff people on the poor job the Air Force was doing on its weapon systems programs. Well, I didn't see how I could use that information. I couldn't put Roback in a spot of going public on second hand information.

The day before I was going up to testify before the armed Services Committee, John Murphy, who was then in charge of Legislative Liaison, came in, and he said, "Well, it's all out in the open now. At the meeting this morning, some of the Air Force material that Moorehead had was being used by Moorehead, and Holifield said, "Well, do I have that material? I don't remember seeing that material." And Moorehead said, "No, I've just received it." "Where did you receive it from?" "Well, I received it from that wonderful public servant, A. Ernest Fitzgerald." "Well, isn't it classified?" and all this kind of thing, all right there in the records." The next day I was testifying. Right in the middle of the questioning—I forget who it was. I think it was the congressman from Alabama started getting into this issue of the Air Force picking on Fitzgerald. I made a mistake probably, but [9] I said, "If you really want to talk about who's picking on whom, I'd really appreciate it if Fitzgerald would work for the Air Force rather than somebody else." Then I immediately realized I had probably gone too far.

Pretty soon all of the committee started getting alert, and they all started asking me questions about it. That's all in the record what was said. At the time I was testifying, I really thought that Ernie had given them classified material, marked "Confidential." Later on, when we still had the opportunity of going over the testimony, it wasn't clear as to whether any of the material was classified or not. So we changed the word from confidential with a capital "C" to confidential with a small "C." In correcting the testimony of the Holifield hearing, Moorehead's office took out the part where he said, "Yes, I received it from A. Ernest Fitzgerald." So it's no longer in there as directly as it was in the original transcript. But I have the original transcript, which I used in front of the Civil Service Commission. However, even in the corrected version of the Holifield hearing, Moorehead admitted to receipt of information for Fitzgerald. This was in a later section.

[10] Another question that—I wasn't asked by the Civil Service commission, and I made up my mind going in there that no matter what happened I was going to be responsive to their questions and obviously tell them the truth up to the point where I talked about conversations I had outside the Department of Defense. This may seem like a strange thing to have to tell yourself—but you'd be surprised when you get in front of those lawyers how you can get twisted around mentally. Then at that point I was just going to draw a line, say, "I'm not going to talk about it." Now maybe I was wrong on that. That was completely my own judgment.

The people that I talked to outside the Department of Defense were, first of all, Bob Hampton, who runs the Civil Service Commission. I did chat with him about this in May and asked him what are you supposed to do when you're managing a large government program and you've got a guy like A. Ernie Fitzgerald on the payroll? He said, "It's frankly one of the problems we face in running the government, and there's no very good answer to it." He said, "On the basis of what you've told me, I don't believe you could ever [11] sustain a separation for cause. So your only alternative is to abolish his job." I kept Mel Laird informed on this, and Mel Laird tried to find some way of moving Fitzgerald down to work with him in some kind of capacity. But every move that was discussed, working with the Blue Ribbon Panel, for example, always involved *loaning* Fitzgerald.

I thought at that time that I didn't come down to Washington to have to put up with that kind of behavior. And if we were going to make a move, the time to make it was when we had the facts at hand and not equivocate for a year and then be faced with the problem all over again. At the same time, I was asked to call Bryce Harlow at the White House on this matter. He said, "Well, I see you've got a problem, but this is not the best time to separate Fitzgerald." So time went on, and the situation got no better. It got worse all the time. For example, Ernie complained that he was removed from the Source Selection Advisory Council when in fact I abolished the Council not even knowing he was a member. The Air Force would

have a meeting on something to do with the C-5, and it would be up there on the Hill in a few days.

[12] One of the issues that came in June was whether Ernie possibly still had a financial interest in his old company, (a), and, (b), whether he hadn't steered some Air Force business to the company in which he had this financial interest. And we ought to investigate it. I said, "What's involved in an investigation?" "Well, you have to get the FBI in, and they in turn can look over all his income tax filings and so on." I said, "Not on your life. We're not going to touch it." It was one of those areas that was fraught with difficulty. I went down, and I checked with Laird on this. I said, "I think this is the wrong thing to do." He said, "I agree. There will be no investigation." Then it was the end of October, I guess, somewhere in there in the fall, we were reducing the secretariat by 70 positions. I think we made a reduction of over 10 percent in the Air Staff. We were trying to make reductions of up to 15 percent. By then we had carefully worked out a management reorganization in Financial Management, abolished his job. It was a very complicated action because he was in Schedule A, and only had bumping rights in two other jobs, where he clearly wasn't qualified; in personnel I guess they were. So he had no recourse in the way of seniority. He never had tenure [13] at anytime. He was hired for two years, and this was his sixth year. My view was that in a reduction of over 10%, his previous actions didn't give him immunity, and there was a real need to improve financial management. On this basis, we bit the bullet, and within hours—I think I'm right—certainly within less than an afternoon's span from the time Schedler gave him the notice of separation, he was on all three networks with Proxmire. I was sure that was going to happen. Then, of course, after that he went to the Civil Service Commission to be reinstated, and then he insisted that the hearings be open to the public, which they never had been before.

One other wrinkle that I'd almost forgotten: The day after this thing became public I got a call from Clark Mollenhoff over at the White House, and he was there as the ombudsman of the White House. He was the guy that was supposed to look around and see where there were problems and listen to what

the press complaints were and help the White House be more responsive. He called and said, "What's with this guy Fitzgerald?" I explained it to him, and he said, "Well, what have you got on him?" I said, "What do you mean by what have I got on him?" He said, "Have [14] you got pictures of him in bed with somebody else's wife, or has he committed any crimes?" I said, "We don't have anything like that." He said, "If you don't have something like that, you'll never make this thing stick." He is the guy that broke the (Otto F.) Otepka (U.S. Dept of State Security Officer) case. And he said, "If I wasn't over here in the White House, I'd make mincemeat out of you on this one. You don't have a case that will stand up." And I said, "Well, thank you very much.". And I refused to ever talk to him about it again.

Of course, he was the guy who sat in on the Civil Service hearings three years later. He was the guy that wrote stuff for the newspapers about it at that time. He was the guy that went over and questioned the President about it at press conferences. But then he had been sitting right in the White House. The day after he talked to me from the White House there was an article in the Chicago Tribune saying that the White House is considering overruling the Air Force for abolishing Fitzgerald's job. I never knew that there had been actual paperwork in the White House on this until Watergate came out, and there was a letter in there that Butterfield had written. This was about two months after—[15] must have been after this conversation I had had when, for some reason, Clark Mollenhoff was still pushing to have him reinstated. And Butterfield's letter was written to Haldeman and said, "We've probably got to request the Air Force reinstate Fitzgerald. We're going to have to take too much publicity and flak if we support the Air Force on this." Nothing in there about whether we were right or wrong or anything like that. But he said, "This will not be too good for morale if people think it's too easy to get reinstated, so let's just let Ernie hang and spin for a while."

I never saw that memo when I was in the Air Force. Then the final ruling of the Civil Service Commission—well, in

addition to going through all the facts of this matter in front of the Civil Service Commission, I'm sure I made it clear, if you look at the record, that I didn't have very much respect for Fitzgerald, for the job that he was doing, or for his capability to help. At the same time, we had abolished his job. We had reorganized the Department, and we had to make substantial reductions in people. And just because a person was notorious, in my view, didn't give them immunity from having their jobs abolished.

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Plaintiff's Deposition
Exhibit 113

January 6, 1969

MEMORANDUM FOR DR. BROWN

SUBJECT: Background Information Relating to Fitzgerald Case

In the Civil Service, all positions are either in the competitive or excepted service. The latter simply means that employees may be selected without the normal competition by examination which is required in the competitive service. The vast majority of positions are in the competitive service, however, there are three categories of positions excepted: Schedule A (positions other than those of a confidential or policy-determining character for which it is not practical to examine); Schedule B (the same type of positions where it is not practical to hold a competitive examination); and Schedule C (positions of a confidential or policy-determining character).

Mr. Fitzgerald's position is excepted under Schedule A. In the Air Force, there are several types of positions excepted under Schedule A: all attorney positions; civilian chaplain positions; part-time and intermittent positions; summer trainee positions under the Youth Opportunity Campaign; cadet hostesses, physical education and music instructors at the Academy; positions on the AF cable ship operated by the AF Communications Service; and the specific authority which covers Mr. Fitzgerald's position; "213.3109(a). Office of the Secretary. Three special assistants in the Office of the Secretary of the Air Force. These positions have advisory rather than operating duties except as operating or administrative responsibilities may be exercised in connection with the pilot studies." It is important to note that positions are excepted from the competitive service only after being recommended by the agency, approved by the Civil Service Commission and published in the Federal Register. The other two positions excepted by this specific authority are: Deputy for Personnel Policy, GS-17, SAFMR, occupied by James P. Goode; and Deputy for Transportation

and Communications, GS-17, SAFIL, occupied by John W. Perry.

As an employee in the excepted service under Schedule A, with Veterans Preference, Mr. Fitzgerald has certain rights, which can be grouped in two categories:

(1) *Adverse Actions.* Chapter 752 of the Federal Personnel Manual applies to discharges, suspensions, furloughs without pay, and reductions in rank or compensation taken by agencies against employees of the United States Government. Mr. Fitzgerald's rights are:

(a) Adverse action may not be taken except for such cause as will promote the efficiency of the service;

(b) He must be given at least 30 full days advance written notice, identifying the specific proposed action, stating the reasons supporting the proposed action, including names, times and places;

(c) The notice must tell the employee that he has the right to reply, both personally and in writing and to submit affidavits in support of his answer;

(d) Normally he must be retained in an active duty status during the notice period;

(e) Full consideration must be given to his reply and if the decision is to effect the action originally proposed, or some action less severe, he must be given a dated and written notice of the decision promptly after it is reached;

(f) The notice of decision must inform him of the effective date of the action, of his right to appeal the adverse action within the agency and to the Civil Service Commission, and of the time limits and procedures for making the appeals.

(2) *Reduction in Force.* In the event his job is abolished, Mr. Fitzgerald is in Tenure Group 1 in the Excepted Service and has the right of full application of all reduction-in-force procedures insofar as "bumping" and "retreat" rights within his competitive level grouping. However, since he is the only

employee in his competitive level grouping and since he did not progress to this position from other lower grade positions, the net result is that he is in competition only with himself. He could neither "bump" nor displace anyone.

These are the rights involved should charges be preferred or should his position be abolished. There is a third possibility, which could result in Mr. Fitzgerald's departure. This action is not recommended since it is rather underhanded and would probably not be approved by the Civil Service Commission, even though it is legally and procedurally possible. The Air Force could request conversion of this position to the career service, utilizing competitive procedures, and consider all the eligibles from the Executive Inventory and an outside search. Using this competitive procedure, Mr. Fitzgerald might or might not be selected. If not, displacement action would follow.

When Mr. Fitzgerald was appointed in September 1965 by Assistant Secretary Marks to fill the vacancy created by the departure of Mr. J. Ronald Fox, it was with a mutual understanding that this was to be a Schedule A appointment of two or three years duration. There is nothing in official records to support this understanding. Dr. Flax contacted Mr. Marks by telephone on January 2, 1969, and verified this understanding and reflected the conversation in his memorandum to the Secretary of Defense, a copy of which is attached. We have carefully screened all files and records and can find no formalized confirmation of this understanding.

If you desire additional information or more detailed specifics, I have the complete files available.

JOHN A. LANG, JR.
The Administrative Assistant

Excerpt From Plaintiff's Deposition
Exhibit 131
[p. 1]

November 4, 1969
[Released by OSD/PA 1700-4 Nov] *

MEMORANDUM FOR CORRESPONDENTS

The Secretary of the Air Force announced today that as part of a reorganization related to the reduction in force of about 850 military and civilian positions within his office and Air Force Headquarters, the position of Deputy for Management Systems in the Office of the Assistant Secretary of the Air Force for Financial Management will be eliminated.

Reorganization of the Office of the Assistant Secretary of the Air Force for Financial Management has been under study for some time. The preceding Assistant Secretary, Mr. Thomas Neilsen, had recommended reorganization prior to his departure, but this action was not implemented.

The present Assistant Secretary, Mr. Spencer J. Schedler, has been working on reorganization plans for several months and with the Secretary's approval is implementing the new organization of his office in conjunction with the current reduction actions in the Air Force.
[illegible] *

[Q & A's attached were provided to OASD/PA. Most were used in one form or another] *

* Material in brackets is handwritten.

Plaintiff's Deposition
Exhibit 137
[Entire exhibit is handwritten]

Seamans' Communications with White House Re Fitzgerald

1. May 9, 1969 Telecon with Bryce Harlow.
2. May 9, 1969 Telecon with Lamar Alexander.
3. May 15, 1969 Talk with Bryce Harlow at White House.
4. November 4, 1969 Telecon with Bryce Harlow.
5. November 5, 1969 Telecon with Clark Mollenhoff.
6. December 4, 1969 Written statement to Clark Mollenhoff.
7. December 5, 1969 Telecon with Bryce Harlow.
8. December 5, 1969 Telecon with Clark Mollenhoff.
9. January 31, 1973 Talk with John Dean at White House.

Plaintiff's Deposition
Exhibit 140

Transcript of Part of Conversation
Between Richard Nixon and Charles Colson
4:17 P.M. January 31, 1973
Oval Office

President: Like, out there, I was very informal today, you know. I just, you know, talked quite a while when I wanted to. Kidded around with Mollenhoff. (laughing) He, he sure presses though.

Colson: That was a tough one too—Eh—

P: Well, it's all right, all right.

C: That's one you, one you—

P: That's what I—However, it's his perfect right. It's good to answer [to disarm him] [unintelligible].

C: I'm just delighted you said you wanted a written opinion because (pause) Course I don't know that that Watergate question, you know is (pause) is gonna be a very delicate one (pause). If—

P: Don't we have to have a written opinion?

C: We should have an opinion.

P: Yeah, I don't want to do it off the top of my head.

C: Oh no, no. I was so relieved when you did that because Mollenho—I could tell what Clark was doing. He was, he was working, working around on—

P: Yeah.

C: the Fitzger—

P: This guy that was fired. I'd marked it in the news summary. That's how that happened. I said get rid of that son of a bitch. You know, 'cause he is, he's been doin' this two or

three times. So Seamans, who isn't much of a sandbagger, uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it.

C: Right.

P: But anyway, that's why I didn't back off of that. But, uh, there are areas as far as Watergate's concerned, I can't claim privilege.

Transcript of Part of Conversation
Between Richard Nixon and Charles Colson
4:17 P.M. January 31, 1973
Oval Office

Colson: And if you get a fluke like the executive privilege thing, the easy answer is—

President: [unintelligible]

Colson: yes, I invoked it. It was properly invoked under these circumstances, and, uh, if you are confused about my position, I'll be glad to issue a policy statement [unintelligible] on a very complex subject that involves the operation of the Government, period. And move on to something else.

Transcript of Part of Conversation
Between Richard Nixon and John Ehrlichman
4:32 P.M. January 31, 1973
Oval Office

President: Actually I was going to check [unintelligible] curiously enough on Watergate and executive privilege.

Ehrlichman: Well I should've—but I—

P: It didn't make any difference.

E: That's something about [unintelligible].

P: What I, what I, no, what I did make a bit of difference about with Dean; we were talkin' about it and I uh, I was pressed for the moment by our friend—

E: Yeah.

P: [unintelligible] there.

E: Yeah.

P: And I, I think I've handled it in a way that probably is a good thing for us to do. You should have the most godawful gobbledygook answer prepared. Just put it out on executive privilege. Something that will allow us to do everything that we want. Our—

E: I lean—

P: I frankly took the line which uh which uh to give them that or the Congress. I, I want to cooperate the I'm going to have it like Mr. Flanigan. We made him available—

E: Right.

P: and so forth. On the other hand uh we have to stand forth, you understand?

E: I've been making the rounds up there. I've talked to Ervin and all these people and uh that I've been showing them the letter that you wrote Moss back in '69 that says all that same thing.

P: Well, why don't you just brush the letter off and, in order to get it, why don't you just give to Mollenhoff as an exclusive?

E: All right.

P Why not?

E: Well, the others'll ask Ziegler for it I imagine in due course. But—[unintelligible].

P: [unintelligible] give it to Mollenhoff.

E: And then he can say, uh, he can give that he's asked Ziegler for it.

P: All right. And Mollenhoff puts it out and Ziegler says, yes, Mollenhoff had this thing—

E: Uh.

P: [unintelligible] Clark—

E: Well—

P: won't satisfy 'em.

He wasn't doin' you any favors today, I'll tell you that, that it was Mollenhoff saying (pause) goddamn on that specific case.

P: I know that he's been having a problem.

E: Uh.

P: Actually on that case you know I recently recall specifically telling somebody (pause) Harlow.

E: Uh, he talked to Harlow about it I believe, but it uh as we've been reconstructing it—

P: When?

E: When Harlow was here. This case arose way early in the administration.

P: I thought it was a later—

E: No, no, no, no this is that guy that, uh, ratted on the C5A overruns.

P: Oh, yeah.

E: Way back.

P: But he's still in the Government.

E: And, no he's not and uh he's appealed to the Civil Service Commission to be restored.

P: I'm thinkin' of another case. Well, any rate, I backed it up—

E: Yeah.

P: which I shouldn't.

E: Yeah. Well, that was fine and we're—

P: Seamans claimed it.

E: we're coverin' your tracks.

P: I didn't want to have any indication of somebody down the line having [been] used privilege uh without—

E: OK, it's OK, we're coverin' his tracks. Uh, Seamans was wrong, he had no right to invoke it, but you backed him up and we can put it, we can put it together in such a way that everything's OK, and uh, don't worry about it.

Transcript of Part of Conversation
Between Richard Nixon and John Ehrlichman
4:32 P.M. January 31, 1973
Oval Office

President: Uh—let me say that I, I've read this case, John. I'm thinking of another guy, actually, I—I—

Ehrlichman: You're thinking of that Navy fellow that talked about Ash. Yeah, the liti—
P: [unintelligible]

E: —this was four years back.

P: You see I had two names—

E: Yeah.

P: —in my mind. Well, it wasn't, of course, that I—

E: No problem.

P: —didn't really, didn't really know—

E: No problem.

P: —the question. But I had to back up the son of a bitch Seamans.

E: Here's what we've done. Just so you get a feel of it. You know the procedure is if a cabinet officer wants to invoke executive privilege he refers it to the Attorney General.

P: Yeah.

E: —says I won't answer the question now, refers it to the Attorney General—

P: Yeah.

E: —and it eventually comes to you if it's, if it's meritorious. So I—

P: I invoke.

E: That's right, and so what, what we're saying is, by the language that Seamans used, he was beginning that process. Here it goes on. Meantime, he has referred this to the Attorney General. The Attorney General's going to look at it and make

a decision as to whether he should answer the question or not. And, you were aware of this fact and you acquiesced in the procedure being started. He made no final ruling.

P: [unintelligible] by that time. But, basically, I said a little more that. I said—

E: No, you were actually pretty good when you read the strict words.

P: I understood, I understood what it was and I approved—uh, I was aware of the case—

E: Yeah.

P: —which I was. Harlow had raised it with me I think.

E: That's correct. That is, way back—

P: Early part of [unintelligible]—

E: So did Clar—, so did Mollenhoff, interestingly enough, uh, this guy, had talked with both Mollenhoff and Harlow here. And I believe [that] at one time or another they both talked to you about it. But Harlow particularly talked to you about it. But you see [one fact]—

P: [unintelligible] canned.

E: —whether or not he should be, uh, well, he really wasn't fired, he was sort of transferred into a non-existent job.

P: So Harlow [unintelligible].

E: Oh yeah, yeah, definitely.

P: Well, that's what I thought.

E: He was a, he was a thorn in everybody's side, you see—

P: Yeah, well, the point was not that he was complaining about the overruns, but that he was doing it in public[ly].

E: That's the point; and cutting up his superiors.

P: That's right.

E: Yeah.

P: And not, and frankly, not taking orders.

E: Well, uh I, I got a, memo here whi' which the facts of the, of the whole Fitzgerald thing—[unintelligible]

P: Might as well put it out, just put out the procedure and so forth and so on. And, uh—

E: On the other thing—

P: The uh, uh, the uh, the uh, with your executive privilege one, just let, uh, if you want, just let, uh—

E: I would rather have Ron just give it to Clark and, uh, let him run with it.

P: Right.

E: Turn him on—[unintelligible]

P: [unintelligible] turn on, but at least it'll help a little, you know.

E: It [sure would/should].

P: Here's the reason I'd give it to Clark. We know that he's been bitching about a lot of things, and so forth and so on. And they think that around here simply because somebody bitches that it [unintelligible] I don't want people to get the impression sombody has to be a hundred percent, John.

E: [unintelligible]

P: Nobody, nobody around here, nobody on our side that would be a hundred percent, except [unintelligible] and, uh, and we [unintelligible] what we [unintelligible].

E: Uh huh.

P: And nothing we can expect never comes to this kind of administration.

E: I getcha.

P: On the other hand, therefore, that they're, that they're on and off, uh, uh, Ziegler was pissed off at him and I wanna do some [unintelligible]. However, [unintelligible] and I say he doesn't have to be a hundred percent. The, uh—at least Mollenhoff doesn't have a double standard. As I said.

Transcript of Part of
Telephone Conversation Between
Richard Nixon and Ron Ziegler
6:51 P.M. February 1, 1973
Executive Office Building

President: Did you get that, uh, did you handle that problem with you uh, uh, the uh, what's that Kilpatrick?

Ziegler: Uh, Fi-Fitzgerald.

P: Yeah.

Z: No problem at all. I just went out and uh—

P: Yeah, I wouldn't let, let 'em make a big thing.

Z: No, they didn't As a matter of fact—

P: It isn't really. It's just a question of uh—

Z: Said that you had been reviewing the transcript last night—

P: Yeah.

Z: after the dinner—

P: Yeah.

Z: when you—

P: Yeah.

Z: were working on your remarks—

P: Yeah.

Z: and so forth and you want [unintelligible] talk about it this morning and uh, and uh, after the Heath thing we discussed it and you wanted me to simply say that you were, that it had never been put before you, that uh, that uh, uh you had misspoken on that, misunderstood the thrust of the question and wanted me to tell 'em that.

P: Uh huh.

Z: And there was no, no problem at all.

P: Uh huh, We uh—by the uh—yeah.

Z: The executive privilege part—

P: Yeah.

Z: Right.

P: Yeah, yeah.

Z: But it uh was not an issue.

P: [unitelligible] questions, as well it would be with Mollenhoff [unintelligible]

Z: Well, I've talked to Clark personally, and he's in good shape.

P: Uh huh.

Z: Matter of fact, he had called uh, uh, both Pat Buchanan and myself and said that he thought that you had, may had, uh—

P: Uh huh.

Z: Uh mis, misunderstood what he was asking—

P: No, I was—

Z: and suggested we—

P: That's right.

Z: we uh, we handle it this way.

P: Uh huh.

Z: So he's in good shape, and we're going to give him the executive privilege, uh, statement tomorrow.

P: Good.

Z: And he's looking forward to that.

P: Good. Good. Good. Fine, fine.

Transcript of Part of
Conversation Between
President Nixon and John Dean
9:12—10:30 A.M. February 28, 1973
Oval Office

President: I understand that y—, y—, that Mollenhoff still thinks everybody should go up 'n' testify.

Dean: That's right.

P: Well——,

D: Uh—h—h.

P: But at least ya had a talk with him. I do want ya to look into the case, though.

D: Yes, sir, I am. [unintelligible].

P: If the guy has got a bad rap, uh, his, his man, God damn it, we'll get him out of it.

D: I'm doing that. I talked to Clark, uh,—

P: Yeah.

D: —yesterday. Uh, uh, I talked to him last night again,—

P: Yeah, OK.

D: —and he's on this as hot 'n' heavy as can be, and I—

P: Well, does he think he's got a bad rap?

D: He does; he thinks he's got a bad rap, and I, you know—

P: Maybe he has.

D: It's very poss—

P: I know Rule doesn't have a bad rap. That one, which, uh, uh, I, I — When Rule, Rule, Rule, uh — Because when a, when a, when a bureaucrat takes it upon himself to go out and, and go 'way beyond the pale in terms of attacking the administration, why, that can't be tolerated. I mean, he, he just—.

D: It's [unintelligible] different [unintelligible].

P: Suppose a Congressman or a Senator or one of his administrative assistants went out [unintelligible], what the hell would he do?

D: [unintelligible].

P: He'd fire him, wouldn't he?

D: Right.

Plaintiff's Deposition

Exhibit 141

December 8, 1969

MEMORANDUM FOR BOB HALDEMAN

FROM: BRYCE HARLOW

Deputy Secretary of Defense Packard David telephoned December 6 to register a vehement protest against any move in the White House area to require continued use of Mr. Fitzgerald.

He said he would talk with you about this.

BNH: nb

Excerpt From Plaintiff's Deposition
Exhibit 202 [p. 1006]

Pentagon Personnel

[7.] Q. Sir, there are two flagrant instances of intimidation and harrassment and threats against Pentagon personnel who may have divulged information to Congress and to the public about cost overruns and mismanagements and irregular industrial alliances.

These two instances are related because some of the same people are involved. I refer, one, to the Gestapo-like interrogation of Pentagon personnel to see who leaked information to Sarah McClendon [representing several newspapers and news services] for news stories. This involves Barry J. Shillito and Edward [J.] Sheridan.

I also refer to the firing of A. Ernest Fitzgerald, whose divulgement of cost overruns saved the American people $2 billion. His greatest critics were Dr. Robert [C.] Moot and Barry J. Shillito.

Will you do something about this, please, sir?

THE PRESIDENT. Miss McClendon, perhaps I'd better, after the way you put that question.

* * *

Plaintiff's Deposition
Exhibit 235B

PRESIDENT RICHARD NIXON'S DAILY DIARY
(See Travel Record for Travel Activity)

CAMP DAVID, MARYLAND — NOVEMBER 17, 1969
4:15 pm, MONDAY

TIME		PHONE P-Placed R-Received		
In	Out	Lo	LD	ACTIVITY
6:45	6:55	P		The President talked with his Counsellor, Bryce N. Harlow.

Excerpt From
Plaintiff's Deposition
Exhibit 237 [pp. 4-8, 10, 12-13]

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

Dr. K. has cleared*

January 21, 1970

CONFIDENTIAL

MEMORANDUM FOR: MR. HALDEMAN

FROM: JEB S. MAGRUDER /JM/

RE: Mr. A. Ernest Fitzgerald

As you know, the A. Ernest Fitzgerald case continues to be a news item. Our information indicates that he is now working with Ralph Nader and he will be on television numerous times in the next few months. There is also an indication of Congressional activity regarding this matter. The following is the position you should take if you discuss this matter with any individuals outside the White House.

* Handwritten

The Nixon Administration has no quarrel with the subcommittee report on the C5A program and its assertions that the prior Administration did not adequately control military spending. Defense Secretary Melvin Laird has asserted that he is determined to insure that past mistakes in the procurement of this transport aircraft will not be repeated.

The testimony of Mr. A. Ernest Fitzgerald on the cost overruns was no embarrassment to the Nixon Administration, for it involved actions taken under a prior Administration. Conscientious efforts are being made to correct the problems pointed up by an Air Force team that included Mr. Fitzgerald. There is no reason for the Nixon Administration to retaliate

* Handwritten.

against Mr. Fitzgerald, since his testimony dealt with the acts of the prior Administration.

Air Force Secretary Robert Seamans has stated there is no relationship between Mr. Fitzgerald's testimony of November, 1968, and the reorganization decision to abolish his job in October, 1969.

Secretary Laird did discuss with Mr. Fitzgerald how he might be useful to the Defense Department. Mr. Fitzgerald presented a paper to Secretary Laird outlining where he believed he could be most useful and according to Secretary Laird "He did not want to be in any kind of staff position. He wanted to be in an operating position and he felt he could not make a great contribution in any particular area."

Therefore, we should indicate that although no specific job was offered, he had an opportunity to continue working at the Defense Department if he had accepted a staff position. At the same time, it should be kept in mind that in the same testimony Secretary Laird stated that Fitzgerald "was fired" by Air Force Secretary Seamans. He also said that Air Secretary Seamans had "assured me" that Fitzgerald's testimony had no connection with the decision to abolish his job. Consequently, in dealing with outside individuals, be very careful in relating the opportunity Fitzgerald had to stay within the Defense Department.

* * *

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

January 22, 1970

[Illegible handwritten note]

MEMORANDUM FOR HENRY A. KISSINGER

FROM: William Watts/W/

SUBJECT: A. Ernest Fitzgerald

The attached memo has been approved by Haldeman as the line on Fitzgerald.

You spoke to Secretary Laird about Fitzgerald yesterday.

Could you take a quick reading on this memo?

Approve as is /HK/

Approve as amended ____

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

January 16, 1970

MEMORANDUM FOR DR. KISSINGER

The January 10 *Chicago Tribune* contained an editorial reporting that somewhere along the line, between the President's reported decision in early December to keep Ernest Fitzgerald and the final moments of his job, the gears failed to mesh. As he cleared out his Pentagon desk, Fitzgerald said that he had been offered no new government job. In previous years the Johnson and Kennedy Administrations suffered from their treatment of another dedicated public servant, Otto Otepka, who also committed the sin of testifying truthfully before a Congressional committee. The equally shabby treatment of Fitzgerald adds no luster to the Nixon Administration.

On reading this the President questioned whether we fumbled this one and asked that you check it out again.

Please submit your comments to the Office of the Staff Secretary.

Thank you.

/s/ JRB
John R. Brown III

THE WHITE HOUSE

WASHINGTON

ACTION MEMORANDUM LOG NO.: P139

Date: Friday, January 16, 1970 Time: 7:30 p.m.

FOR ACTION: Dr. Kissinger cc (for information):

FROM THE STAFF SECRETARY

DUE: Date: Friday, January 23, 1970 Time: 2:00 p.m.

SUBJECT:

President's request that you review the decision on Ernest Fitzgerald.

ACTION REQUESTED:

X For Necessary Action ____For Your Recommendations

____Prepare Agenda and Brief ____Draft Reply Brief

____For Your Comments ____Draft Remarks

REMARKS:

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

/JRB/
K. R. Cole, Jr.
For the President

[Gen. Haig FYI]*

THE SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

February 19, 1970

SANITIZED COPY

MEMORANDUM FOR: Assistant to the President for National Security Affairs

SUBJECT: Presidential Requests

In your memorandum of January 19, 1970, you requested information on three matters for the President. These items are discussed in the following paragraphs:

* * *

[3]

Offer of new government job to Earnest Fitzgerald.

— Regarding this third item, you will recall our conversation in December when I called you from Paris. At that time I referred to previous conversations in September at San Clemente. As you know from those conversations, there is no validity to the story that "gears failed to mesh" in the Fitzgerald case.

— Stories such as the 10 January editorial in the *Chicago Tribune* appear to emanate from other White House Staff offices. It would be helpful if you could stop such stories at the source.

/s/ MELVIN LAIRD

---

* handwritten

THE WHITE HOUSE

WASHINGTON

January 24, 1970

HAK **For the Record**

I informed Jeb Magruder that the guidance memorandum on Fitzgerald was concurred in by Henry Kissinger as is.

/W/
WW

Excerpt of Plaintiff's Deposition
Exhibit 248

Recommendation

Mr. A. Ernest Fitzgerald
Department of the Air Force
for
Air Force Association's
Citation of Honor

Table of Contents

1. Specific Justification
2. Draft of Proposed Citation
3. Personal Data
4. Appendices

Specific Justification

During his assignment as Deputy for Management Systems, Mr. Fitzgerald has earned a reputation for technical competence, initiative and dedication to the improvement of resource management within the Department of Defense. He is noted for his vigor, consistently high quality of end product and dynamic leadership. He eagerly accepts the most difficult assignments and has demonstrated an extraordinary capacity to deal with them successfully. His counsel has been actively sought by and freely given to the Air Staff, the Air Force Secretariat, various elements of the Office of the Secretary of Defense, other Government agencies, and representatives of industry on a variety of subjects, some of which are beyond the scope of his ordinary responsibilities. (Appendices B&C)

While Mr. Fitzgerald's overall performance has been sufficiently outstanding to merit the assignment of outstanding performance ratings for successive years, and a nomination by the Secretary of the Air Force for the DOD Distinguished Civilian Service Award (Appendix D), his nomination for this award is based on three specific accomplishments during this calendar year:

1. Development and implementation of a Cost/Schedule Planning and Control System (C/SPCS).

2. Participation in major weapons systems source selection.

3. Distinguished service as the Air Force representative on the DOD/CODSIA Advisory Committee.

Development and Implementation of a Cost/Schedule Planning and Control System

a. Almost from the beginning of his present assignment, Mr. Fitzgerald recognized the need for a reliable and simple system for measuring contractor cost and schedule performance. He was acutely aware of the numerous cost overruns which the Air Force was experiencing, often coupled with failure to meet schedules. Existing management systems were based upon a rigid work breakdown structure which required additional processing on the part of the contractor to provide information in this format. In many instances, the information thus developed bore no resemblance to that developed by the contractor for his own internal management. In addition to the increased cost associated with the development of the information required by the Government, the contractors tended to use inherent differences in data accumulated under the two systems to explain findings by the Government of poor performance.

[2]

b. Mr. Fitzgerald recognized that a system of reporting to the Government which was based upon the contractor's own internal reporting system should provide the Government with increased visibility with respect to contractor cost and schedule performance at a lesser cost than was currently being experienced. He personally encouraged key personnel in the Air Force Systems Command to make a specification, having the above characteristics, part of each major development and procurement contract. Largely, as a result of his personal leadership and encouragement to the Systems Command, the Air Force has been able to implement this "specification" concept well in advance of the related efforts in OSD. By his aggressive leadership, Mr. Fitzgerald has influenced the early

development of a C/SPCS which will be implemented throughout DOD. He has worked diligently to insure that the DOD specification meets the minimum requirements for measurement of contractor performance.

c. Mr. Fitzgerald has personally participated in the orientation required for Government and contractor personnel to insure an understanding of the C/SPCS. He has worked long hours with key management personnel and supervisors alike to provide an understanding of the management concepts involved, and where necessary, technical interpretation of the procedures themselves. His wide experience with aerospace industry operations has enabled him to discuss any aspect of the contractor's process. Over the years, he has developed personal acquaintances in the aerospace industry which cover the spectrum from shop foreman to president. He knows first hand how to resolve possible conflicts and which segments of the contractor's organization must be "sold" to insure successful implementation of the procedures. His prior experience as a management engineer, quality control and cost control technician insures that his technical opinions are highly regarded by both Government and industry representatives. Mr. Fitzgerald personally outlined validation procedures to be used in determining the acceptability of contractor responses under the provisions of the C/SPCS specification. These are now being used as models by Government personnel in insuring proper application of the specification to contractor activities.

d. While Mr. Fitzgerald has not accomplished the development and implementation of the C/SPCS without assistance, it is fair to state that he deserves credit for early adoption of a strong system for measuring contractor performance within the Air Force. It can be further stated that he has exerted a major influence over the procedures now being finalized in OSD.

[3]

Participation in Weapons Systems Source Selection

a. Present Air Force management procedures provide for solicitation of proposals from various contractors for new weapons systems. These proposals are based upon general

guidance furnished by the Air Force with respect to performance characteristics, mission employment, and other technical characteristics. The contractor provides his estimate of the cost of producing these weapons along with refined performance data and a specific time schedule.

b. Mr. Fitzgerald has been assigned to several special Air Staff groups concerned with systems source selection. He has demonstrated a keen understanding of performance characteristics and an ability to probe in depth the cost and economic data that have been furnished by each contractor. His incisive analysis of these proposals has contributed greatly to any element of the decision which is based upon the results of cost effectiveness comparisons. A letter of appreciation for Mr. Fitzgerald's work on the SRAM (AGM-69A) Systems Source Selection is attached. (Appendix E). Due to his outstanding performance on this selection, he was requested by name to participate in the source selection for the Maverick.

Distinguished Service as the Air Force Representative on the DOD/CODSIA Advisory Committee

a. As the Air Force representative on the DOD/CODSIA Advisory Committee, Mr. Fitzgerald has displayed great leadership in presenting to this group the rationale behind the Air Force and DOD requirements for information from industry. He has been able to clearly and effectively answer all questions posed by the industry representatives. He has made a major contribution by bringing into focus issues raised by CODSIA and then providing the information necessary to substantiate the action taken or proposed by the Government.

b. As a result of his experience with contractor operations, he has been able to discuss on an equal basis, all major technical questions concerning industry operations. His familiarity with manufacturing processes, normal organizational alignments and specific features, such as overhead rates, sustaining rates, economic projections, etc., enable him to make a case for improved Government visibility in contractor operations which cannot be refuted.

c. The aggressive leadership, which Mr. Fitzgerald has displayed, marks him as a spokesman for Department of Defense management systems. He has encouraged OSD representatives to display "the courage of their convictions" in finalizing DOD policy. Although somewhat reluctant to provide the kind of information on contractor activities deemed necessary for Air Force/DOD management, industry representatives have conceded the logic and technical soundness of Mr. Fitzgerald's arguments and proposals.

In appreciation of the outstanding contributions of Mr. A. E. Fitzgerald, which are illustrated by the examples provided above, the Air Force is proud to nominate him for the Air Force Association's Citation of Honor.

Proposed Citation

In recognition of his exceptional contribution to the development, installation and utilization of improved management systems throughout the Department of Defense. His dynamic leadership, comprehension of the types of information needed for assessment of efficiency and effectiveness, and vast experience with Aerospace Industry operations, are recognized by colleagues and industry representatives alike. The major contributions which he has made to better resource management reflect exceptional ability, great initiative and an overriding concern for the best interests of the United States Air Force and the Department of Defense.

DEPARTMENT OF THE NAVY
HEADQUARTERS NAVAL MATERIAL COMMAND
WASHINGTON, D.C. 20360

MARCH 6, 1967

Mr. A. E. Fitzgerald
Deputy for Management Systems
Office of Assistant Secretary of the Air Force
(Financial Management)
Washington, D. C. 20330

Dear Mr. Fitzgerald:

Please accept my personal thanks for taking time from your busy schedule to take part in the very fine presentation concerning selected Acquisition Information Management Systems at the recently completed Tri-Service Plant Representatives Conference. I am certain that I am speaking for all the attendees in expressing appreciation to you for sharing your knowledge and experience. Your presence undoubtedly contributed to the overall success of the conference and was truly indicative of its tri-service nature.

Additionally, please pass on my appreciation to LCOL Taylor, and Mr. Stern at USAF Headquarters for their excellent contributions to the agenda in the areas of contractor performance evaluation and MILSCAP.

Sincerely,

/s/ I. J. Galantin
I. J. Galantin
Vice Admiral, USN
Chief of Naval Material

Job Description

Office, Secretary of the Air Force
Assistant Secretary of Air Force
Financial Management
Deputy for Management Systems
GS-301-17

I. Introduction:

The incumbent of this petition will serve as Deputy to the Assistant Secretary of the Air Force for Financial Management with responsibility for the development of improved management controls and broader use of statistical analysis within the Air Force.

II. Duties and Responsibilities:

1. In the capacity of Deputy for Management Systems to the Assistant Secretary of the Air Force, (Financial Management), provides guidance to the Air Staff and the Commands in the development and/or implementation of management information systems.

2. Analyzes and reviews Air Force operational plans, mobilization plans, programs for foreign aid and other data upon which financial requirements for resources are based in order to develop or direct the development of effective management control systems.

3. Develops policies and procedures and monitors the implementation of Air Force statistical programs including methods of analysis and presentation.

4. Serves as an advisor to the Assistant Secretary (Financial Management) while he is appearing before Congressional Committees and personally serves on such committees and boards as specified by the Assistant Secretary.

5. Assure necessary program coordination between the Department of Air Force, Department of Defense and other governmental agencies.

III. Controls Over Work:

Reports to the Assistant Secretary of Air Force (Financial Management). Supervision is limited normally to status reports furnished to the Secretary for purposes of keeping him informed and/or for further guidance and direction.

IV. Other Significant Facts:

This position requires access to TOP SECRET information. Sensitive under paragraph 4b(2)(a), AFR 40-23.

ARMED FORCES MANAGEMENT ASSOCIATION
NATIONAL HEADQUARTERS

839 SEVENTEENTH STREET NW SUITE 207
WASHINGTON DC 20008
TEL 202 838 1838

18 September 1967

Mr. A. Ernest Fitzgerald
Deputy Assistant Secretary, M.S.
Department of the Air Force
5B975, The Pentagon
Washington, D. C. 20330

Dear Mr. Fitzgerald:

On behalf of the membership and our conferees I wish to express sincerest appreciation for your appearance on the program of our Fourteenth National Conference.

Your outstanding talk on cost/schedule planning and control did much to set the tone of the meeting. Judging from the many favorable comments, your message will be long remembered.

I am sure that your presentation has done much to enlighten the attendees, and will accomplish even more in the cause of improved Defense management when published in our forthcoming JOURNAL.

We hope we will have the distinct privilege of having you with us again.

Sincerely,

/s/ William B. Bunker
William B. Bunker
Lieutenant General, USA
President

THE ASSISTANT SECRETARY OF THE AIR FORCE
WASHINGTON

16 February 1967

Dear Ernie:

I am delighted to forward Secretary Brown's letter indicating that you have been nominated for the Department of Defense Distinguished Civilian Service Award. To me, it is most appropirate that you should be recognized in this manner for your contributions, particularly in the area of improved management in the acquisition of major weapon systems, have been for the total Department of Defense, not just the Air Force. Whether or not you in fact receive the award from the Department of Defense, I believe it significant that our Secretary has nominated you as a representative of the Air Force for this unusual recognition.

Congratulations!

Sincerely yours,

/s/ Ted
Leonard Marks, Jr.

Mr. A. Ernest Fitzgerald
Deputy for Management Systems
SAF-FMM
Department of the Air Force

DEPARTMENT OF THE AIR FORCE
WASHINGTON

OFFICE OF THE SECRETARY FEBRUARY 2, 1967

Dear Mr. Fitzgerald:

It was my pleasure to nominate you for the Department of Defense Distinguished Civilian Service Award. The splendid and enviable record reflected by the recommendation submitted on your behalf is a credit to you and the civilian employees of the Federal Government.

Nomination for this award is indeed an honor. You have reason to take pride and satisfaction in your many contributions in the field of financial management which this nomination recognizes.

Sincerely,

/s/ Harold Brown

Mr. A. Ernest Fitzgerald
1552 Forest Villa Lane
McLean, Virginia

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C.

January 17, 1967

REPLY TO ATTN OF: AFRDD

SUBJECT: Appreciation

TO: SAFFM (Mr. A. E. Fitzgerald)

THRU: SAFFM (Mr. Leonard Marks)

1. I am indeed pleased to convey to you expressions of appreciation and commendation which have reached me for our recently completed efforts as members of the Special Air Staff Group (SASG) for the SRAM (AGM-69A) System Source Selection.

2. Secretary McNamara termed the SRAM Source Selection as "exceptionally thorough" and "outstanding" and expressed the wish that his appreciation be extended to all those who had a significant part in it. Secretary Brown asked that his thanks be added to Mr. McNamara's for a job well done and added that such praise from the Secretary of Defense "is not easily earned." General McConnell also requested that all concerned be congratulated for their fine work.

3. Please accept my sincere appreciation and personal thanks for your outstanding contributions throughout the SASG deliberations. Your individual inputs comprised a significant part of the overall effort which has earned such high praise.

/s/ Andrew J. Evans, Jr.,
Andrew J. Evans, Jr.,
Maj Gen, USAF
Director of Development
DCS/Research & Development

Excerpt of Plaintiff's
Exhibit 249
[December 1966]

Mr. A. Ernest Fitzgerald
Department of the Air Force

Table of Contents

1. Personal Data
2. Background Data Supporting Justification for Award
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6. Photograph

Personal Data

Name	A. Ernest Fitzgerald
Position Title & Grade	Deputy for Management Systems to the Assistant Secretary of the Air Force (Financial Management)
Organizational Location	Office of the Secretary of the Air Force, Pentagon, Washington, D.C.
Date & Place of Birth	July 31, 1926, Birmingham, Alabama
Residence	1552 Forest Villa Lane, McLean, Va.
Marital Status	Married—Mrs. Nell Fitzgerald three children
Education	University of Alabama B.S. Industrial Engineering, 1951 Post Graduate Work 1951-1952
Honors and Awards	Tau Beta Pi—Engineering Honary Alpha Pi Mu Phi Eta Sigma Civil Service Outstanding Performance Rating—February 1966
Previous Experience	Prior to joining the Air Force in 1965, Mr. Fitzgerald held managerial assignments in industry, worked as a management consultant to major aerospace contractors and government agencies, created and served as president of his own management consultant firm. As president of Performance Technology Corporation, Management Consultants, engaged by the Minuteman System Program Director to develop and implement improved management controls for that program. The results of this effort largely provided the basis for the current development of improved program management concepts being adopted throughout the Air Force.

Management consultant to the Navy on the Mark 48 Torpedo program and the Standard Missile Type program. During this engagement, he was responsible for significant improvements in contractor and Navy management which resulted in substantial cost reductions being realized by the Government in the acquisition of these weapons.

Managing associate and principal in Arthur Young & Company, Certified Public Accountants. Responsible for incorporating industrial engineering techniques into large scale financial control systems which were highly effective in reducing costs and improving operations in clients' commercial and government business.

Senior plant and chief industrial engineer, Kaiser Aluminum Chemical Corp. of Baton Rouge. Responsible for development and adoption of improved inventory control systems by all company plants. Responsible for significant increase in plant operating efficiency through introduction of more effective management procedures.

Member of a management task force at Hayes Aircraft which developed and installed a comprehensive planning, scheduling and costing system for all aircraft maintenance and manufacturing operations.

Supporting Justification for Award

Ernest Fitzgerald's efforts for the Air Force and for the Department of Defense are, and have long been in the most distinguished traditions of government service. His overriding concern has consistently been the best and most permanent interest of the United States, and to this he has devoted

exceptional initiative, outstanding ability, and an unusual breadth of experience. He is by every standard a most appropriate nominee for the Department of Defense Distinguished Civilian Service Award.

Mr. Fitzgerald's responsibilities as Deputy for Management Systems to the Assistant Secretary of the Air Force (Financial Management) encompass an unusual variety of complex and important issues. He serves as the focal point in the Air Force for the development and implementation of resource management systems and serves on several DOD/Industry committees and groups concerned with controlling management systems development in the Department of Defense. His responsibilities also include the analysis and review of Air Force plans and programs upon which financial requirements for resources are based in order to develop or direct the development of effective management control systems. As Air Force representative on the Department of Defense Resources Management Steering Group, Mr. Fitzgerald's unique experience and sincere dedication has provided the primary force behind progress made to date in achieving many of the Department of Defense objectives.

In his designated role of overall resources management program coordinator, Mr. Fitzgerald displayed a remarkable insight with respect to the kinds of problems that had to be resolved, both with respect to Project PRIME and Selected Acquisition Information and Management Systems (SAIMS). This insight into the issues served to alert other Air Force participants in time to develop solutions far in advance of the other Services. An example was his early identification of the need to examine the proposed OSD chart of accounts in relation to OSD program element definitions and output measures. He explained the application of performance measurement concepts to Air Force activities and the relationship of the present Air Force work measurement program to this concept. This approach can be expected to pay large dividends in future years by insuring optimum use of Air Force resources.

In the area of SAIMS, Mr. Fitzgerald's unusual background and exceptional initiative were responsible for the

approach currently being pursued by the Department of Defense for the management of all future major systems acquisitions. This approach calls for the development of a specification, outlining the basic criteria that contractor's internal management systems must meet to satisfy government requirements. Contractors' existing systems are then evaluated against these criteria. Reports to the government, while at a summary level, are derived from the contractors' own system and reflect the true status of the program. The concept of a systems specification in lieu of past imposition by the government of specified systems, which most often resulted in redundant reporting systems at contractors facilities, has been labeled by many as a quantum advance in Defense Management thinking. Under his direction and guidance, the Air Force has taken the lead in the Department of Defense and is already successfully applying this new management approach on several major systems acquisitions.

Because of his demonstrated technical competence, Mr. Fitzgerald has earned the respect of all major aerospace contractors. The status which he enjoys throughout industry has enabled him to gain a degree of acceptance of Air Force and DOD management programs far in excess of that which would have been accomplished by other fully qualified incumbents. His personal acquaintances in industry, which cover the spectrum from shop foreman to president, have provided entrees for other Department of Defense personnel which were of inestimable value in resolving conflicts and in obtaining industry coordination on DOD proposals.

Mr. Fitzgerald has also displayed outstanding leadership in improving the Air Force cost analysis capability as chairman of a committee to evaluate costing and pricing activities of the Air Force. He identified the existing limiting factors and has initiated action to resolve them. Specifically, he has been instrumental in accomplishing a specific delineation of responsibility between the Deputy Chief of Staff, Systems and Logistics, and the Comptroller of the Air Force with respect to cost analysis for planning. Successful resolutions of this relationship will in turn improve the definition of responsibilities within AFSC and other major commands.

He provided essential guidance and analysis in evaluating successive F-111 cost studies which have been prepared for the Secretary of the Air Force. It is generally acknowledged that his incisive review of these cost data contributed to better understanding and acceptance of the Air Force estimates at all levels of the Department of Defense. As a by-product of this effort, Mr. Fitzgerald identified the need to employ revised procedures to be used in the preparation of future systems cost estimates.

Mr. Fitzgerald had undertaken his responsibilities with characteristic vigor and exceptional initiative, and has performed them all ably and with an intense dedication to excellence. He has consistently and gladly accepted the most difficult responsibilities. His counsel has been actively sought by and freely given to the Air Staff, the Air Force Secretariat and other government agencies on a variety of problems outside his ordinary responsibilities.

Based on the above, the Air Force proudly recommends Ernest Fitzgerald, Deputy for Management Systems to the Assistant Secretary of the Air Force (FM), for the Distinguished Civilian Service Award.

Citation to Accompany Department of Defense
Distinguished Civilian Service Award
To
Mr. A. Ernest Fitzgerald

In recognition of exceptional devotion to duty and extremely significant contributions in the development of improved management systems designed to increase resource management efficiency and capability in the Department of Defense. His overriding concern has consistently been the best and most permanent interests of the United States, and to this, he has devoted exceptional initiative, great ability and an unusual breadth of experience. He represents the finest traditions of government service.

Summary

Mr. Fitzgerald's responsibilities encompass an unusual variety of difficult but essential tasks. He exercises general direction of the Air Force development and implementation of management systems, and provides counsel and assistance to the Air Force Secretariat on assigned problems. He is responsible for providing program coordination between the Air Force, the Office of the Secretary of Defense and other government agencies.

Mr. Fitzgerald has exhibited the ability to advance through successive levels of responsible management positions in industry and government as a specialist, middle management, consultant, president of his own firm and Deputy Assistant Secretary. In each instance he has made significant and lasting contributions. His logical approach to problem solutions and his critical, penetrating analysis of each facet of a problem result in constructive recommendations as well as consistent results which are and have been in the best interests of the Air Force and the United States. His capacity for work far exceeds that required or expected and the logic of his efforts is so superior that he has come to enjoy the complete confidence and reliance of his associates and Departmental Secretaries.

An example of the potential benefits to be accrued by the Department of Defense through use of these improved management procedures can be seen in the results of a recent contract competition. The successful bidder, a major aerospace contractor who has adopted these improvements as a direct result of Mr. Fitzgerald's efforts, was able to confidently submit a bid at less than 50% of the government estimate. This substantial saving realized on the Minuteman Program has stimulated a tremendous interest on the part of industry and government concerning future potential benefits.

In consideration of his exceptionally outstanding ability and his significant contribution toward the improvement of resource management procedures in the Air Force, the Air Force is proud to recommend Mr. A. Ernest Fitzgerald for the Department of Defense Distinguished Civilian Service Award.

Excerpt of Plaintiff's Deposition

Exhibit 258 [pp. 456-57]

Firing of Mr. Fitzgerald

[456] MR. MAHON. The testimony of Mr. Fitzgerald of the Air Force has been mentioned in the testimony this afternoon. I would hope that the Secretary of Defense and the Department of Defense, including all the military services, would cooperate with any man in or out of the Department, or in and out of the Government, in an effort to save money and promote efficiency.

Has Mr. Fitzgerald committed any act of disloyalty or anything inappropriate?

SECRETARY LAIRD. I am really not the best witness on that. To my knowledge, Mr. Chairman, he has not.

MR. MAHON. If he is the man who helped to uncover the C-5A overrun, it would seem that he would be the type we ought to encourage and if the Air Force wants to let him go we ought to use him in some other capacity in the Department of Defense to help us to locate cost overruns and promote efficiency. This would be in keeping with your determination to eliminate overruns.

SECRETARY LAIRD. I talked to him, Mr. Chairman, as I said earlier, about his possible usefulness in the Department of Defense. I had [457] him prepare a paper for me as to where he could be useful as far as the Department of Defense is concerned, if he had difficulty in the Air Force.

That paper was presented to me as an outline of where he could be useful, and really the conclusion was that he did not want to be in any kind of staff position. He wanted to be in an operating position and he felt that he could not make a great contribution in my particular area. I feel that the decision as to the reorganization of the Office of Financial Management made by Secretary Seamans is a decision which should be made by him. It is perfectly within his responsibilities, and I will certainly support his decision to reorganize that office.

I want to make it clear that I happen to believe that Mr. Fitzgerald's position on the C-5A cost overrun has been correct.

Now, I know that this committee has long been concerned about the overrun problem and I was sitting right across the table when this was developed.

MR. ANDREWS. You helped overrun it—I mean bring it out.

SECRETARY LAIRD. It was closely held by the Department of Defense in the past.

MR. ANDREWS. Mr. Flood and I have collaborated on three questions that we would have asked. First, was there an overrun? That has been answered.

Second, did Mr. Fitzgerald discover the overrun or bring it to light? That has been answered.

MR. MINSHALL. It should be made clear though we brought out a C-5 overrun in this committee in 1968. It's in last year's testimony if I remember correctly.

MR. ANDREWS. I understand, but Mr. Fitzgerald, as I understand the Secretary's testimony, had something to do with announcing the overrun.

SECRETARY LAIRD. He announced it in November in a public session of the Joint Economic Committee.

MR. ANDREWS. Now, the third question we would have asked: Was he fired?

SECRETARY LAIRD. He was fired.

MR. ANDREWS. Did his disclosure have anything to do with his being fired?

SECRETARY LAIRD. The Secretary of the Air Force has assured me that it did not.

MR. ANDREWS. He was fired for other reasons?

Reduction in Air Force Headquarters Staff

SECRETARY LAIRD. Because of the reorganization of the Office of Financial Management, and a reduction in force and as far as the Air Force is concerned—and I want this understood—the Air Force staff in the Washington area has been reduced by 857 employees. There are people who are going to be complaining about being let out, but there are 856 others that are also involved in this reduction. It isn't easy to cut back on civilian people and particularly in the Washington area.

MR. MAHON. It is very desirable, Mr. Secretary, if the personnel are not needed.

* * *

Defendants' Deposition

Exhibit 40

THE WHITE HOUSE

WASHINGTON

November 17, 1969

MEMORANDUM FOR THE PRESIDENT

THROUGH: Bryce Harlow /BH/

FROM: Clark Mollenhoff /Clark/

SUBJECT: The Dangers Involved in the Air Force Decision to Abolish the Job of Mr. A. Ernest Fitzgerald

The abolition of the job held by Mr. Fitzgerald has been pictured in the press as "the firing" of this man for giving honest testimony on the cost overruns on the C5A program.

Unless there are clear and overwhelming reasons why Mr. Fitzgerald should be fired, this decision should be modified in some manner to avoid most serious embarrassment to Secretary Laird and the White House. In my judgment, this decision is likely to plague the Administration for months. Senator Proxmire, and those in the press and Congress who are sympathetic to Mr. Fitzgerald, will try to escalate this controversy in the days and weeks ahead. This will result in persistent questioning of Secretary Laird in press conferences. This is certain to be followed by a similar pattern of questioning at Presidential press conferences.

I do not believe this matter was well handled by the Air Force in the first instance, for it should have been recognized that this case represents particularly sensitive problems. I am aware of the general Air Force contention that Mr. Fitzgerald's record justifies termination of him and abolition of the job. I am also aware that a friction has developed over a period of many months that would make it most difficult for Mr. Fitzgerald to continue in his present position with the Air Force. Also,

I am told that his superiors believe he is the source of information that has been leaked to the Proxmire committee. Without going into the merits of the Air Force complaints about Mr. Fitzgerald, it is obvious that there must be a clear and overwhelming case against him if the Air Force is to try to remain in the present posture. It is my best information that no such overwhelming case can be made. As I see this matter, the Administration has the following alternatives:

1. To remain firm in the present posture and meet the storm that is certain to be stirred by the Washington Post, the New York Times, and the TV networks. There will be every effort to paint the Administration as engaged in a firing to appease the military industrial complex. It will be difficult to get through with any contrary views.

2. The Air Force can remain in the present posture and prepare an aggressive assault upon Mr. Fitzgerald because of his reported deficiencies and activities that displease his superiors. If that case is strong enough to show Mr. Fitzgerald is not a good public servant, then this course might be acceptable, but my own view is that there has been some misjudgment at the Air Force Secretary level as to how strong the case is against Fitzgerald.

3. The Administration can arrange to move Mr. Fitzgerald to some other job in the Defense Department that has real duties and real responsibilities and that demonstrates there is no disposition on the part of the Administration to penalize Mr. Fitzgerald for testifying on the C5A. Such a move should be accomplished by clear exchanges of letters that demonstrate that Secretary Laird and the Air Force Secretary have had good and sufficient grounds for terminating Fitzgerald's job and stating that it was totally unrelated to the testimony he gave on the C5A. This exchange of letters should try to set out Mr. Fitzgerald's qualifications in perspective with the commendation for his testimony on the C5A, as well as a brief statement on any deficiencies that are provable in connection with other duties. This plan would have the

advantages of removing Mr. Fitzgerald from the Air Force area where there is obvious friction that would interfere with his performance of duties there and transfer him to other work where his talents might be properly utilized. If there is concern over his loyalty to the present Defense leadership, he should be assigned to studies that deal with problems of the Kennedy-Johnson Administration where there should be no reason for conflict with this Administration.

The C5A and the Fitzgerald matter are problems that come out of the McNamara-Clifford direction of the Defense Department, and this Administration should take every step to make certain that we do not adopt these problems of an earlier era. We will probably have enough problems of our own to deal with without borrowing trouble from Mr. McNamara's regime.

I am ready to take any steps you believe are necessary to try to iron this out.

1. Call Air Force Secretary then Al Haig re quare present intentions.
2. Call Mollenhoff

Defendants' Deposition

Exhibit 42

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 5, 1969

MEMORANDUM FOR THE PRESIDENT

FROM: Clark Mollenhoff /Clark/

SUBJECT: The Fitzgerald Case

The Administration position on the Fitzgerald case is untenable and can only become worse as the Proxmire investigation proceeds.

The Fitzgerald case has come under the broadest editorial attack from conservative as well as liberal newspapers. These attacks range from those in the Washington Post and the Milwaukee Journal on the liberal side, to those in the Omaha World Herald and The State newspaper published in Columbia, South Carolina, on the conservative side. Conservative writers compare it to the Otepka case.

Fitzgerald is pictured as a man "fired for giving truthful testimony to Congress." These attacks come from conservative Republicans to liberal Democrats. The closer the record is examined the worse the record looks. The testimony of Air Force Secretary Robert C. Seamans and Assistant Secretary Spencer Schedler appears ludicrous on its face. Even if the testimony is true, it still lacks credibility on dozens of points. It will be virtually impossible to persuade any responsible Republican to defend what has been done. Presidential defense of this record could be disastrous.

See attached suggestion for Presidential action and position.

Attachment

December 5, 1969

Suggested Presidential Position on the A. E. Fitzgerald Case

The Administration has no quarrel with the Senate Subcommittee report on the C5A program asserting that the prior Administration "has not been adequately controlling military spending." It can be noted that Defense Secretary Laird stated he is "determined to ensure that past mistakes in the procurement of this transport aircraft will not be repeated."

The following points should be made:

1. C5A cost problems were inherited from the Johnson Administration, and Fitzgerald's testimony on cost overruns was no embarrassment to the Nixon Administration. Conscientious efforts are being made to correct the problems pointed up by an Air Force team that included Mr. Fitzgerald.

2. There is no reason for the Nixon Administration to retaliate against Fitzgerald. Air Force Secretary Robert Seamans says there was no relationship between Fitzgerald's testimony of November 1968 and the reorganization decision to abolish his job in October 1969.

3. There is an unfortunate erroneous public impression that Nixon Administration appointees abolished Fitzgerald's job as retaliation for giving testimony on scandals of a prior Administration. This arises from an extensive record on complicated contract decisions and personnel decisions.

4. To correct the record and to prove good faith, I am directing the Secretary of the Defense to offer Mr. Fitzgerald a proper post to use his talents in the fight to control Defense spending.

It is important to take this extra step to avoid any mistaken public impression that the Administration would be a party to retaliation against a man who gave testimony dealing with Defense waste. The job must meet these tests:

1. A bonafide job offer, not make work.

2. On the same level.

3. In an area where old personnel frictions arising from the long controversy on C5A will not impede Mr. Fitzgerald's future contribution.

Defendants' Deposition

Exhibit 101

December 4, 1969

MEMORANDUM FOR JOHN EHRLICHMAN

We will need for the President's Briefing Book, hopefully sometime Friday before noon, answers to possible questions about:

1. Loopholes in the Draft Law
2. The President's position on the "youth wage"
3. The President's position on the OEO Amendments
4. The President's position on Federal assistance to medical research and medical schools. Where is the money?
5. Our position on this fellow we fired who is filing suit against the President's decision to oust him.

Thanks.

PAT BUCHANAN

Defendants' Deposition

Exhibit 108

A. Ernest Fitzgerald

Q. Mr. President: Did this Administration fire Mr. A. Ernest Fitzgerald? And are they willing to take him back?

A. I don't think "firing" would be the accurate characterization at all. The suggestion that this Administration somehow retaliated against Mr. Fitzgerald is erroneous. The cost overruns on the C-5-A and in other defense programs—brought to light by the team which Mr. Fitzgerald worked with, are no embarrassment to this Administration. Every revelation dealt with actions, decisions, and contracts made under Secretary McNamara, not under Secretary Laird.

As for the new post, I believe some discussions were held with the Defense Department, but Mr. Fitzgerald has taken a post elsewhere.

Defendants' Deposition

Exhibit 109

December 8, 1969

MEMORANDUM TO THE PRESIDENT

FROM: PATRICK J. BUCHANAN

The President should know that Defense has sent me Q and A on the Fitzgerald matter which in effect re-states the President's full confidence in Secretary Laird, and which says that in this matter, the President is relying on Laird's and Seamen's judgment. As the President is aware, Mollenhoff disagrees strongly with this position; and from a public relations standpoint—I think the President would do himself well if handled it in the way suggested in the previous question—and if we told Laird that this is what we are going to do, if asked.

Defendants' Deposition
Exhibit 110

THE WHITE HOUSE
WASHINGTON
December 5, 1969

Churchill quote*

MEMORANDUM FOR H. R. HALDEMAN

Attached are additions for the President's Briefing Book.

PAT BUCHANAN

Fitzgerald

reinstate.*

* Handwritten.

MEMORANDUM TO THE PRESIDENT

FROM PATRICK BUCHANAN

RE THE FITZGERALD CASE December 5, 1969.

Mr. Fitzgerald's job at Defense has been abolished. He is the man who is given credit for uncovering and revealing the cost-overruns on the C-5-A. The Pentagon is catching hell from liberals and conservatives for firing a guy whose only crime seems to be that he was an aggressive investigator who found mistakes in the procurement of the transport which cost billions.

In PR terms we are getting a beating, and why should we?

Mollenhoff's investigation finds that the guy is a good public servant, and he has the public behind him. Why should we purge him—simply to make the bureaucrats at the Pentagon happy?

Mollenhoff's suggestion to you (with which I agree) is that the President say, if asked:

> "It is true that Mr. Fitzgerald's job is being abolished, but it is not because of his performance in it; he has, to my knowledge, been a dedicated and effective public servant. After looking into it, I have decided to direct the Defense Secretary to find Mr. Fitzgerald another position, of equal pay and stature—not a make-work job—where his talents can continue to be used by this Administration."

Making the President appear to be a just man is worth ticking off the fellows out to get this guy. (*Note:* The Service Secretaries are on the television Sunday, and it might be well if RN is to take this position, to inform them of it.)

Defendants' Deposition

Exhibit 112

THE WHITE HOUSE

WASHINGTON

December 5, 1969

MEMORANDUM FOR THE PRESIDENT

FROM: Clark Mollenhoff /Clark/

SUBJECT: The Fitzgerald Case

The Administration position on the Fitzgerald case is untenable and can only become worse as the Proxmire investigation proceeds.*

The Fitzgerald case has come under the broadest editorial attack from conservative as well as liberal newspapers. These attacks range from those in the Washington Post and the Milwaukee Journal on the liberal side, to those in the Omaha World Herald and The State newspaper published in Columbia, South Carolina, on the conservative side. Conservative writers compare it to the Otepka case.

Fitzgerald is pictured as a man "fired for giving truthful testimony to Congress." These attacks come from conservative Republicans to liberal Democrats. The closer the record is examined the worse the record looks. The testimony of Air Force Secretary Robert C. Seamans and Assistant Secretary Spencer Schedler appears ludicrous on its face. Even if the testimony is true, it still lacks credibility on dozens of points. It will be virtually impossible to persuade any responsible Republican to defend what has been done. Presidential defense of this record could be disastrous.*

See attached suggestion for Presidential action and position.

Attachment

* Underscoring is handwritten.

December 5, 1969

Suggested Presidential Position on the A. E. Fitzgerald Case

The Administration has no quarrel with the Senate Subcommittee report on the C5A program asserting that the prior Administration "has not been adequately controlling military spending." It can be noted that Defense Secretary Laird stated he is "determined to ensure that past mistakes in the procurement of this transport aircraft will not be repeated."

The following points should be made:

1. C5A cost problems were inherited from the Johnson Administration, and Fitzgerald's testimony on cost overruns was no embarrassment to the Nixon Administration. Conscientious efforts are being made to correct the problems pointed up by an Air Force team that included Mr. Fitzgerald.

2. There is no reason for the Nixon Administration to retaliate against Fitzgerald. Air Force Secretary Robert Seamans says there was no relationship between Fitzgerald's testimony of November 1968 and the reorganization decision to abolish his job in October 1969.

3. There is an unfortunate erroneous public impression that Nixon Administration appointees abolished Fitzgerald's job as retaliation for giving testimony on scandals of a prior Administration. This arises from an extensive record on complicated contract decisions and personnel decisions. *

4. To correct the record and to prove good faith, I am directing the Secretary of the Defense to offer Mr. Fitzgerald a proper post to use his talents in the fight to control Defense spending.

---

* Handwritten note in margin at this point: "briefing book this afternoon."

It is important to take this extra step to avoid any mistaken public impression that the Administration would be a party to retaliation against a man who gave testimony dealing with Defense waste. The job must meet these tests:

1. A bonafide job offer, not make work.

2. On the same level.

3. In an area where old personnel frictions arising from the long controversy on C5A will not impede Mr. Fitzgerald's future contribution.

Defendants' Deposition

Exhibit 113

[January 1970]

* * * *

Fitzgerald

Despite surface indications that the Nixon Administration might be different, Ernest Fitzgerald learned the truth of an old government adage—never rock the boat. Don't buck the bureaucracy. If you do, they'll get your job. Somewhere along the line, between the President's reported decision in early December to keep Fitzgerald and the final moments of his job, the gears failed to mesh. As he cleared out of his Pentagon desk, preparing to go into business as a private consultant, Fitzgerald said he had been offered no new government job. In earlier years the Johnson and Kennedy administrations suffered from their treatment of another dedicated public servant, Otto Otepka, who also committed the sin of testifying truthfully before a Congressional committee. The equally shabby treatment adds no luster to the Nixon Administration. It can only be a victory for the entrenched Pentagon bureaucrats. (1/10 *Chicago Tribune* editorial)

* * * *

H—I wonder if we fumbled this one—check it out again [Check mark—/JRB/]*

---

* Handwritten.

Defendants' Deposition

Exhibit 135

PLEASE TREAT AS CONFIDENTIAL

May 29, 1969

MEMORANDUM FOR: MR. EHRLICHMAN
COLONEL HUGHES

SUBJECT: Mr. A. Ernest Fitzgerald

It has just come to my attention—by word of several mouths, but allegedly from a senior AFL-CIO official originally—that a civilian named A. Ernest Fitzgerald, presumably employed by the Department of the Navy, is about to blow the whistle on the Navy by exposing to full public view that service's "shoddy purchasing practices." Evidently, Fitzgerald attended a recent meeting of the National Democratic Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic.

I believe that this information has been passed already to Bill Sullivan at Justice (FBI), but I thought I should alert each of you to the facts as they were presented to me.

ALEXANDER P. BUTTERFIELD

NOTE: Elmer Juanich has just brought to my attention the fact that an A. E. Fitzgerald is listed in the current Pentagon telephone directory as being assigned to SAFFM (Office of the Assistant Secretary of the Air Force/Financial Management.)

PLEASE TREAT AS CONFIDENTIAL

Defendants' Deposition
Exhibit 143
[Entire exhibit is handwritten.]

re troop anncmt. maybe not on TV

no major things to say other than anncmt.

anncmt on Tues—by statement—no appearance

P. Hope—Armstrong

Har P. likes Colson as coord.—*not* Macomber

Bryce as strategist.

E. Need to see Cab. officers

Bkfst. No prayer—just music

E. Schlesinger—put Fitzgerald in Budget on non-defense problems

Defendants' Deposition
Exhibit 150

12-23-69

[President] Mayo Schlesinger E

1. Mollenhoff Rec. C.P. *re* Ill.
2. Roger Lewis
3. (Hexagon) Hidden over-runs
4. Fitzgerald—don't hire
5. Tax on polluters

New taxes—[illegible]

6. Stockpile sales—message—omnibus bill

Defendants' Deposition

Exhibit 151

December 30, 1969

MEMORANDUM FOR CLARK MOLLENHOFF

cc: Bob Haldeman

The President has decided not to insist upon finding a position in government for Mr. Fitzgerald.

JOHN D. EHRLICHMAN

Defendants' Deposition

Exhibit 163

January 3, 1970

MEMORANDUM FOR LARRY HIGBY

Please find out the status of Fitzpatrick, the guy they fired at the Defense Department. Has he been put into a post in Budget as the President directed? What is the post, etc. If he has not been, let me know what his current status is and what plans they have for him.

After I get this report you should remind me that the President wants Ziegler to call in Sara McLyndon and tell her what we have done with Fitzpatrick.

H.R. HALDEMAN

HRH:pm

Defendants' Deposition

Exhibit 165

[illegible]

5:50 p.m.
/pm

Upon talking to the Press yesterday, his last official day at the Pentagon, Fitzgerald said that contrary to recent speculation in the Press, he was not going to work for the Federal Government . . . but instead was going to work in the private consultant business.

Fitzgerald did ask that his security clearance not be taken away in that he had hopes of using it in his future work.

Alex's Remarks

Let's let him bleed for awhile. He is 100% disloyal—not without expertise in his field, but nonetheless 100% disloyal. His parting words to the Administration appeared in this morning's Washington Post—they were in essence, "the big dogs will be all right in this Administration, but the little people never will."

If there is still some plan to pick up Fitzgerald and bring him into the Federal Government structure, we should certainly not do it right away. I say this for two reasons:

1. It would be admission of error on our part.

2. Senator Proxmire and others who have made a hero of Fitzgerald deserve first choice. Let's wait awhile and see if they pick him up.

Defendants' Deposition

Exhibit 169

[Entire document is handwritten]

B—When family

Now: RN. PN.

Family need

When specific request.

Reminder of Categories.

[illegible] of Election day. Who did we send staff to. Do we need to do for [illegible] also.

Alex—Fitzgerald—what happening on this.

Phone Call Program—

Local outreach—Planned program of contact. If we can get list then what do we do.

Do thinking on their own. Then what do we say when we call.

Often do phone calls instead of appt. [illegible] phone calls. Appts. we accept can't we do then as phone calls.

What do we have now in the way of phone list. Chapin get copies of list. Keep in touch with key leadership types in Bus, financial, political communities. Next Monday.

Defendants' Deposition

Exhibit 170

CONFIDENTIAL January 7, 1970

MEMORANDUM FOR H. R. HALDEMAN

FROM: LARRY HIGBY

SUBJECT: Fitzgerald

Attached at Tab A are Alex Butterfield's remarks on the Fitzgerald situation. In summation it indicates that Fitzgerald is not going to work for the Federal Government and that we should not make any attempt to hire him.

I talked to Director Mayo last night and he indicated that the decision had been made approximately a week ago not to bring Fitzgerald into the Bureau of the Budget. Apparently this came about as a result of the discussion between Ehrlichman, Mayo, and the President during a Budget session. In that session Mayo raised the point that to bring Fitzgerald into the BOB would be like bringing a pipeline for Proxmire into the BOB. The President said that was completely right and that we certainly didn't want to do that and to just forget the idea of bringing Fitzgerald into the BOB.

In addition I spoke with General Haig. He indicated that negotiations had begun on offering Fitzgerald some other positions at BOB, but that Fitzgerald had never followed up on them.

In summation, it looks like Fitzgerald is leaving the government and no plans are being made to accommodate him anywhere. Before finalizing this conclusion, however, I would suggest that you might want to speak to John Ehrlichman on this matter.

Attachment

LH:pm

Defendants' Deposition Exhibit 172
Transcript Of Part Of A Conversation
Between Richard Nixon
And Ronald Ziegler
4:50-5:15 P.M. February 26, 1973
Old Executive Office Building

Ziegler: Clark Mollenhoff.

President: Oh, yeah? What's he want? [Unintelligible]?

A: Well, he is pushing the case of, of, uh, Fitzgerald—

P: Yeah.

Z: —and, uh, I don't burden you with the details but he says that one of the generals who testified at the Civil Service Committee hearing indicates that his investigative record showed that Fitzgerald was cleared in May of 1969. Clark then goes on to point out in his letter to you that he gave me that when he was here serving as your special counsel—

P: Yeah.

A: —that the Air Force came into his office and [unintelligible] here at the White House in December of 1965, '69, many months later and indicated that Fitzgerald was still under a question—

P: Yeah.

Z: —of conflict of interest and so forth.

P: Right, right.

Z: The point of his letter is that—

P: He wants—

Z: —he feels—

P:—[unintelligible].

Z: —something should be done.

P: Yup.

Z: He, he wants, feels that something should be done about the Fitzgerald case and if not, uh, he feels that he is compelled to testify before the Civil Service hearing.

P: Right, right—. Well, but wait a minute, he's got, uh—

Z: See, which, which—

P: —executive—

Z: —would—

P: —privilege.

Z: —which would mean that he would be testifying before the Civil Service hearing on information that he obtained while he was working in the, for the President of the United States. He says—.

P: He didn't get it from me, though.

Z: No.

P: Did he?

Z: And he, Clark, I don't think understands executive privilege 'cause he points out in here that he, that, he said, "As I know, as you know, I disagree with the President the issue on executive privilege and would not avail myself, uh, of it, un, under, under any circumstances. [Unintelligible]."

P: Oh, hell, let's let it go. What were the, uh, what is the situation on the case? I don't really have any, uh—

Z: Well, I don't want—.

P: —interest in it whatever.

Z: What I would like to do—

P: Yeah.

Z:—is because he has this letter and he said—

P: Right.

Z: —you know, I uh—

P: Yup.

Z: —told him that I—

P: Sure.

Z: —have seen the—

P: Sure, sure.

Z: —President. Is to have John Dean call Clark in—

P: Yeah. Right.

Z: —at your request—

P. Right.

Z: —and simply put the facts on the Fitzgerald case and see what—

P: Tell him the President wants him to—

Z: —to do.

P: —to get the facts and see what the situation is and, uh, we'll, uh, and if, bu-but it would be best if he not raise it in a, uh, [unintelligible].

Z: That's what I think.

P: [Unintelligible]. He should call him into [unintelligible].

Z: All Right, I will. I'll call Clark now.

P: Yeah. And say, "Look, that the President [unintelligible] about it and said, 'Look, that he had no particular recollection of the, of, uh, of the matter we [unintelligible] the other day. [Unintelligible] this guy he's [unintelligible] what [unintelligible] we've got the Air Force guy [unintelligible].' "

Z: You see, this is a case of, that, that, uh—

P: Came before we—.

Z: —came before we came in—

P: Oh, yeah.

Z: —but when we came in it was all Harlow's ball game [unintelligible]. I had a call in to Bryce on it.

P: Bryce was all for canning him, wasn't he?

Z: No, I think Bryce may have been the other way. That's why I [unintelligible]—.

P: Oh.

Z: See, at one point in '69—

P: Oh.

Z: —there was some discussion about hiring Fitzgerald over here at OMB—

P: Oh.

Z: because it was felt that he did get a bum rap over there.

P: Oh, see?

Z: But I—.

P: You see, the case I was thinking about, when you asked me, was the other case—

Z: Rule.

P: —the Rule case, that's right. I thought [unintelligible]—.

Z: Which we can't say, of course.

P: I can't go [unintelligible].

Z: And that's the one that, uh, that Admiral Kidd did such a great job in handling—

P: Yeah, yeah.

Z: —but Clark being such a zealot, as he is—.

P: No, well, he may be right.

Z: He might be right.

P: That's what I wanna tell him. The President has made, he says he may be right and says to get to the bottom of it. We'd like for him, "the President asks that you [unintelligible] talk to Dean and he says that the President has some recollection that Harlow has some information on it. Why don't you talk to Harlow and then, to, uh, present the facts to me? And I'll see what we could do."

Z: All right.

P: "[Unintelligible] the President's taken a personal interest in it." I don't want him to write [unintelligible]—

Z: Oh, no.

P: —but he can later. Tell him that—

Z: On a private basis.

P: —that he's privileged to write it later, but I, uh, I said that I felt that I was [unintelligible] going to get [unintelligible] to the bottom of this case, tell him [unintelligible] did, we did [unintelligible]—

Z: Yeah.

P: —you know, uh—

Z: OK.

P: —uh, [unintelligible] and ask, tell him I'd be interested in his personal evaluation of, he thinks he's [unintelligible].

Z: Yup.

P: [Unintelligible].

Z: In spite [unintelligible].

P. All right. Fine. Tell him—.

Z: He sent you a call in [unintelligible]—

P: Yeah.

Z: —[unintelligible] tomorrow about a Kent Cook, retired Air Force weapons analysis who died of a heart attack in '54, and Clark said that [unintelligible] living on a very low salary in terms of this whole bureauc—. See, Clark had a—

P: Who was Kent [unintelligible]?

Z: —[unintelligible]—.

P: Did we do it?

Z: No, we didn't do it.

P: Jesus Christ.

Z: That this is one of these—.

P: Well, Clark [unintelligible]. You gotta remember that he, uh, also in fairness to, Ron, Clark, uh, you [unintelligible].

Z: Well, I [unintelligible].

P: [Unintelligible] Clark does, uh, also one of those fellows that, tries to, tried to defend that other, that, that State Department, you remember that guy that we put on, uh, [unintelligible] no, he had, I think he was with Willard Edwards on that case. You remember that case?

Z: I don't remember the name.

P: Well, the one that involved, uh, the, the fellow that they canned at the State Department, you know, because he, uh, conducted security [unintelligible]. Remember we put him on the [unintelligible]?

Z: Oh, yeah, [unintelligible] Tucker.

P: [Unintelligible]. Put Tucker in.

Z: [Unintelligible].

P: Well, just say the President has said that this, this intrigues him. The case intrigues him and he thinks Clark's an honest reporter and he wants the facts and he's asked Dean to get the facts and also discuss executive privilege with him. Well, to get the facts. He'd also like for him to get, [unintelligible] he wants Harlow, and get Harlow [unintelligible] on it. Now, we're not, we're not, uh, we, uh, this is not [unintelligible] no skin off our backs. We just wanna know the facts, but he must not write it until we get the facts. Then I'll look at it. That it'll be per— [unintelligible]. When they get, Dean gets it properly presented, it will be presented to me and I'll make a judgment on it myself.

Z: All right.

P: Fair enough?

Z: That's good.

P: And he's, I thought, and I said, [unintelligible], "Well, the President's expected to take a personal interest in the [unintelligible], and he's decided to [unintelligible] on this

himself. You can't write it yet. First talk to Dean. He also'd like you to talk to Harlow. Both Dean and Harlow we will ask for an opinion on it. And we'll [unintelligible] get, get the Air Force's, uh, judgment [unintelligible]. Get their side of it too, and, uh, uh—."

Z: The reason I raise this in this manner [unintelligible]—.

P: Well—.

Z: I just don't want him to hit you [unintelligible].

P: [Unintelligible]. Well, you say, "This is, this is very interesting, and uh—."

Defendants' Deposition

Exhibit 181

THE WHITE HOUSE

WASHINGTON

CONFIDENTIAL Date 12/9

TO: MOLLENHOFF
FROM: BOB HALDEMAN

FYI _X_ PLEASE HANDLE _____

PLEASE REVIEW AND SEE ME _____

OTHER: The P. has asked Mayo to bring Fitzgerald into the Budget Bureau to work in non-defense areas.

H.

Exhibit 84
To Plaintiff's Third
Request For Admissions

THE WHITE HOUSE

WASHINGTON

February 2, 1970

good job*

Keep it up*

MEMORANDUM FOR THE PRESIDENT

Following is a report on the actions completed in response to your requests during the week of January 26 to February 2.

1. Request that Harry Dent submit analyses of Senators Prouty, Stevens and Ralph Smith.

   ACTION—Mr. Dent's report was sent to you on January 29.

2. Request that John Ehrlichman have Dr. McCracken and Dr. Burns assess the recent statement that the U.S. is headed for a recession.

   ACTION—Mr. Flanigan reports that Dr. McCracken discussed this with you on Saturday, January 31.

3. Request that John Ehrlichman appoint a group to submit a plan for school integration which provides decent education for all.

   ACTION—A Presidential memorandum was sent to the Vice President requesting that he chair a group to develop political and programmatic plans to help southern communities maintain a decent system of public education while wrestling with the problem of complying with the Supreme Court decision on desegregation. (Tab A)

* Handwritten, beneath a check mark.

4. Request that John Ehrlichman prepare an information kit on our drug program.

   ACTION—Mr. Ehrlichman's report on the preparation of the kit is attached at Tab B.

5. Request that Bryce Harlow contact Les Arends to help resolve the Congressional GOP-Southern Democratic conflict.

   ACTION—Mr. Harlow reports that although Les Arends strongly discounts this conflict, he will very gently check it to see what he can find. (Tab C)

6. Request that Bryce Harlow prepare a note to Senator Baker for his support of RN's State of the Union address.

   ACTION—A copy of the letter sent to Senator Baker is attached at Tab D.

7. Request that Bryce Harlow draft a congratulatory letter to Senator Henry Jackson on his selection for the 7th Annual Congressional Award to the VFW.

   ACTION—A copy of the letter sent to Senator Jackson is attached at Tab E.

8. Request that Bryce Harlow draft a letter to Congressman Anderson congratulating him on a good rebuttal to Senator McGovern's "baby bonus" proposal.

   ACTION—A copy of the letter sent to Congressman Anderson is attached at Tab F.

9. Request that Dr. Kissinger submit an analysis of the significance of President Thieu's recent shake-up involving two of his generals.

   ACTION—Dr. Kissinger's report was sent to you on January 26.

10. Request that Dr. Kissinger review the decision on Ernest Fitzgerald.

ACTION—Jeb Magruder's report on Mr. Fitzgerald is attached at Tab G. Dr. Kissinger feels no further action is necessary.

11. Request that Dr. Kissinger make every possible effort to ensure that we host the 1976 Olympics.

ACTION—A copy of Dr. Kissinger's memorandum to Secretary Rogers initiating action on this request is attached at Tab H.

**Attachments to Plaintiff's
Opposition to Defendant
Nixon's and Defendant Harlow's
Second and Defendant Butterfield's
Third Motion for Summary Judgment**

Attachment A

9 January 1968

MEMORANDUM FOR SECRETARY BROWN:

During the past seven years, OSAF has followed a consistent policy of intensive improvement of our major acquisition management systems. As a joint effort, staff specialists in OSAF, the Air Staff and the Major Commands have formulated approaches with great potential for improving management of these major acquisitions. The Air Force leadership in this area has been recognized by OSD by the adoption of a number of the Air Force developed methods throughout OSD.

To assist in capturing the full benefit of the past years of work, we should now focus additional attention on cost performance.

As we recently discussed, I suggest that my Deputy for Management, spaces be established as the focal point for this effort. Initially, the assignment of the military space and one civilian space should be sufficient to assist Ernie Fitzgerald's office in this endeavor. We will review the requirement for people as the work proceeds, but it is my hope that this effort will be picked up by the Air Staff and Major Commands thereby obviating the need for additional people in this office.

Ernie and I believe our initial efforts should be directed to Minderson. Ernie's long experience with this program and knowledge of the cost information available will be invaluable to the personnel assigned to this task. We are pleased with the action the SFO has initiated on Cost Performance, but we firmly believe we can provide substantial help in bringing meaningful direction to the SPO's efforts.

Additionally, an Automated Proposal Evaluation System, APES, (formerly CPA) is an active computer-oriented cost-analytical technique—is available within the Minuteman SPO for capturing and storing for later use the massive procurement cost data.

Attached to Author background are two names by Ernie which outline his assessment of the job to be done. Ernie and I would be pleased to discuss this matter further at your convenience.

Within the next few days, I will submit a similar memo requesting additional people for assignment to Major Pewitt's office.

Thomas Nielsen
Assistant Secretary of the Air Force

Attachments

Attachment B

DEPARTMENT OF THE AIR FORCE

WASHINGTON 20330

January 10, 1968

MEMORANDUM FOR MR. NIELSEN, SAFFM

After reading your memorandum of 9 January 1968 concerning additional manning for the office of your Deputy for Management Systems, Dr. Brown made the following comments re the penultimate paragraph:

"Tom,

I agree that this area needs attention badly, that your office is the place to do it, and that the Deputy for Management Systems is a proper focal point. I remain concerned about adding net people to OSAF or any office thereof. I would therefore, in line with our discussion last month suggest you determine the net requirements for the cost control job and systems analysis job, see where there may be offsetting decreases in ASAF(FM), see how far you can use long-term loans from the Air Staff to avoid adding slots. Please go over this with John Lang (showing him these comments) and then discuss with me as you suggest. Also, you should go ahead and prepare the necessary description of functions for John Lang's office to issue when we decide to proceed.

HB"

Would you take appropriate action, please.

/s/ BRIAN GUNDERSON
Brian S. Gunderson
Colonel, USAF
Executive Assistant

Attachment H

Affidavit

VERA GLASER, being first duly sworn, deposes and says:

As a columnist for The Knight Newspapers, Inc., I interviewed Alexander P. Butterfield, Administrator of the Federal Aviation Agency, on October 26, 1973. In accordance with my regular practice and with the permission of Mr. Butterfield, I personally had the interview recorded by tape. Attached to this affidavit is a true and accurate copy of the portion of the typed transcript of the tape recording of the interview with Mr. Butterfield, which deals with Mr. A. E. Fitzgerald.

/s/ Vera Glaser
Vera Glaser

Subscribed and sworn to before me
this 1st day of July, 1974.

/s/ Bonita K. Bowman
Notary Public

My Commission Expires: 30 April 1978

Excerpt from taped interview with FAA Administrator Alexander Butterfield October 26, 1973

Q—Were you involved at all in the Fitzgerald matter? A—No.

Q—Was it you who said that "loyalty is the name of the game?" A—Yes, it was my memo. I would write that memo again. That's been taken out of context. I had no policy role at the White House. I attended a meeting which as on a number of different subjects. One of the many subjects was the Fitzgerald issue.

This was a high level meeting at the White House in Haldeman's office and one of the subjects was Fitzgerald. From what I heard about what Fitzgerald did, from the story that was given to us in that meeting about the course of action he took and how he circumvented channels, I went back to my office and said, "no way should we allow him to .... If it's up to us, and the subject was being discussed as to what course of action to take from the White House with regard to Fitzgerald, that it's my humble opinion Haldeman, for what you want to do with it, and I wasn't the kind of fellow that would normally advise Haldeman on anything—it wasn't my role at all. My role was almost purely administrative. I dealt only with the President. I worked quite independently from Bob Haldeman, as a matter of fact, in my day-to-day tasks. For what it's worth to you, from what I know, from that meeting, he should not be allowed back on the federal payroll. He's done something that's unpardonable in any organization.

Q—You mean not going through channels?

B. Yes. I mean he should ... now maybe he did, but it was my understanding that he didnt. I dont know, See that's why I'm not qualified to say anything about the Fitzgerald case. My memo was just from Alex Butterfield to Bob Hald sort of two people, not in any official way at all. I don't know how any one I said and then let him bleed ... I didnt mean I wanted his gums to bleed or his lips or his arm or his navel .. You know, that is so ridiculous—twist in the wind and let em bleed. Colson walking over his grandmother—all those things. And I

was there when Colson said that. That was just a fight talk. Colson said, "let's get in there, man. Let's get off our asses and do something. Why I'd walk over . . . He wouldnt walk over his grandmother. Ehrlichman was talking about a friend of his about twist. I bet George Allen's saying about the same thing, even worse, every Saturday. Let him bitch a little bit. Let him cry. And I said, he may be a top-notch analyst or whatever he is and at least for a while, let's let him bitch, because I dont think the government's wrong here, and if we put him back on the payroll, we're admitting that the government is wrong. The government was entirely right. Now it could be that I do not know the facts. I'd be the first to admit that I dont know the true facts. I've never met him. I give him all the credit in the world for being a savvy fellow. But if he did what I was told in that meeting immediately before I wrote that memo, then I'm not sorry for what I said, but it was such a little dinky inter-office memo. It was not to have any force. And when that memo came out, I was surprised because I'm not privy to that memo. That's the President's property.

How did some one get that memo? And then of course they ballyhooed it, and they made me look like some sort of a bloodthirsty guy. I wrote one other memo, similar to that, out of my field entirely, Haldeman should have said, this is none of your business. Butterfield—which he probably did—but after the Sontay raid, the President was contemplating making that Colonel who led that raid a general. Well, I spent a long time in the military. You dont make generals for that. I mean, there's a very, very complex, intricate fine system for promoting officers to general officer. An awful lot of things are taken into consideration. When a guy does something like lead a raid like that, that took a lot of courage. That's why they have awards and decorations in the military. And you give him the highest one in the land (who was the Sontay man?) I forget his name. I really do. Colonel something. The President was just considering.

So I wrote a little memo to the President. I just wanted to remind him that the military, when its time for him to be promoted, and it may be that the military should decide that, because so many other things are considered. His ability to

command. His presence, and all of these kinds of things. and a medal, fine. You can give him the Congressional medal if you want. The medal of honor, the distinguished service cross—which I think he got, (The President took your advice on that?) Well, I dont know if he did or not. The fellow wasnt promoted to general.

But those are the only two cases I can think of in which I acted sort of out of my role just for whatever he wanted . . .

Q—I appreciate your telling me about the Fitzgerald case because . . . . A—Well, my old Friend Clark Mollenhoff, who was my friend, has taken . . yes, he did in this because I guess he's Fitzgerald's benefactor in some way. He's written some terrible things about me as a result of that.

Q—But you still think Fitzgerald should not be on the government payroll? A—Well, I'd hate for you to quote me. I dont even know the Fitzgerald case. But as it was outlined in thatmeeting, I thought he did, but if some FAA fellow just took it upon himself to decide, he is deciding that I am doing something wrong and goes to the Congress with it, I think that fellow ought to be fired, because he can go to Secy. Brinegar. He can come to me. He can go to Brinegar. Maybe Fitzgerald went to a few people, but I think he ought to go to the Secy of the Air Force's home and camp there if he has to before going to Congress. To me, thats a little bit . . .

Q—And the Congress? A—They love it. And if he's going to do that. I think he should call the Air Force down if they're wasting money. He definitely should have seen some one. But there's so many people to see before you go to the Congress. That's all I'm saying. And that's why I wrote loyalty is the main thing.

Attachment I

[810] LTCOL. TEAGARDEN: And he does so decline, sir.

MR. BODNER: I would like to get it from the witness.

BY MR. BODNER:

Q—Let me ask you this question, Mr. Secretary. Did you or anyone, to your knowledge, contact anyone on the White House staff or in the White House or elsewhere in the Federal Government, suggesting that there might be an error in the President's statement? A—I decline comment.

Q—Would you state the reason why you decline, sir? A—Executive privilege—excuse me, I meant to say I consider it a privileged communication.

As Colonel Teagarden has said, it is somewhat moot whether the term Executive privilege applies in this case.

Q—Would you tell us the basis on which you refuse to answer? A—That I consider that comment about any discussions, communications with the White House, between the White House and the Air Force to be a privileged matter.

Q—Have you received the approval of the White House or the President to invoke privilege in response to that question? A—I consider that a privileged matter.

Q—Do you know, sir, that before you can invoke Executive privilege to cover communications with the White House,

* * *

[853] right? A—Yes.

Q—You are also claiming it with respect to the exercise of Executive privilege by you last week, isn't that right, any communications you had with the White House with respect to that? A—Yes.

*

Q—And you are also claiming it with respect to any communications with the White House or the President with respect to the statement made by the President and the statement made by Ron Ziegler; is that right? A—Yes.

Q—Now, there is one other area which I would like to ask you about. Are you claiming Executive privilege with respect to communications with the White House after the decision was made to terminate Mr. Fitzgerald, but for the purpose of explaining to the White House the basis of that decision? A—Yes.

Q—Are you aware, sir, or do you have any knowledge that after the decision was made to terminate Mr. Fitzgerald on November 4, 1969, Mr. Schedler, along with Colonel Pewitt, was called to the White House to give an explanation for Mr. Fitzgerald's termination? A—I am not aware of that.

Attachments 3 through 6
to
Motion to Dismiss or, in the Alternative, for Summary Judgment (filed November 21, 1978)

UNITED STATES DISTRICT COURT

Southern District of California

Civil No. 75-4-T

PETER BOHMER; PAULA THARP,

Plaintiffs,

v.

RICHARD MILHOUS NIXON, et al.,

Defendants.

Opinion and Order

[Filed June 17, 1976]

Plaintiffs Peter Bohmer, formerly a professor at San Diego State University, and Paula Tharp, formerly a staff member of the San Diego Street Journal, brought this lawsuit in January 1975. Plaintiffs are self-styled critics of the American form of government, and of the Nixon Administration.

Plaintiffs allege a broad, nationwide conspiracy among present and former federal and local officials, and members of a right-wing paramilitary group known as the Secret Army Organization. Federal officials, who include then President Nixon, are said to have implemented, approved, or condoned various plans and programs, the purpose and effect of which were to suppress dissident activities of such groups as the "New Left" or of persons sharing the views of the plaintiffs. Examples of these programs include: "Cointel," the "Huston Plan" the "White House Enemies List," the "Liddy Plan," and so forth. Generally, the acts alleged in furtherance of the conspiracy or conspiracies are local in nature, and encompass the conduct of the F.B.I. the C.I.A., their informants, and numerous

agents of the San Diego County Sheriff's Office and the San Diego City Police Department, among others. The acts themselves include: a shooting, telephonic threats, vandalism, firebombings, warrantless searches, and a bad faith criminal prosecution which resulted in a felony conviction.

Plaintiffs allege the conspiracy or conspiracies and the overt acts constitute infringements of their civil rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments, as well as under the Civil Rights Acts [42 U.S.C. §§ 1983, 1985, 1986] and the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C. §§ 2510-2520]. As redress for these alleged wrongs plaintiffs seek an injunction, a declaratory judgment, and money damages of 5.3 million dollars. From former President Nixon, plaintiffs seek the same relief, although at oral argument they recognized the mootness problems, and therefore concentrated on the money damage aspect of the case against him. This Court proceeds on the assumption money damages is the primary form of relief sought.

Mr. Nixon, through private and government counsel, in separate motions, moves to dismiss the claims against him on the ground that the discretionary acts of a Chief Executive present non-justiciable questions over which this Court has no jurisdiction to review. Rather than the traditional grounds of justiciability, Mr. Nixon really urges the contention that he is immune from suit for acts done while President.

I.

To the extent that it is contended, this Court must reject the argument that a President is absolutely immune from judicial relief, whatever the form of that relief, and whatever a President's conduct. *National Treasury Employees Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974); *Nixon v. Sirica,* 487 F.2d 700 (D.C. Cir. 1973); *cf. United States v. Nixon,* 418 U.S. 683 (1974).

II.

What remains is an argument grounded in concepts of separation of powers to the effect that this Court should not retain jurisdiction over the action against Mr. Nixon under the circumstances presented in this case. The contention is premised on the notion that the judiciary should limit the circumstances in which it will afford judicial relief to a plaintiff in an action against the President. The purpose of judicial self-restraint is to avoid needless constitutional adjudications and direct confrontations between the judicial and executive branches of government.

There are certain plausible policy justifications to support what amounts to a distinction in treatment between a President and any other executive officer. Courts recognize the interests of the nation are generally best served if a President is not required to divert precious time to the defense of his every judgment or decision in a court of law. More importantly, it is desirable to foster a President's independence of thought and judgment, rather than to routinely subject his decisions to judicial scrutiny. *See generally Nixon v. Sirica, supra,* at 750-752 (MacKinnon, J., concurring and dissenting opinion). Implicit in these considerations is the practical recognition that the Chief Executive acts through his agents, and in many circumstances, delegates almost completely the performance of certain duties.

Generally, courts have recognized that the judiciary may give mandamus relief where the executive function is ministerial or perfunctory in the sense that a specific action is commanded by a statute or by the Constitution. *Mississippi v. Johnson,* 71 U.S. (4 Wall) 475 (1867); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). Yet no case has been cited or found in which this relief was actually given against a President. These same cases acknowledge that judgmental or discretionary acts of a President are not reviewable by the judiciary.

Recent Presidential cases have mollified the absoluteness of the latter proposition, recognizing that in certain, limited circumstances the judicial branch must determine directly, the

legality of acts of a Chief Executive. *See, e.g., National Treasury Employees Union v. Nixon, supra; Nixon v. Sirica, supra.* In the *National Treasury* case, the Court of Appeals found that the Federal Pay Comparability Act, 5 U.S.C. § 5301 et seq., required the President to perform a ministerial act, the actual performance of which had not been delegated. Because the requirement to act was deemed ministerial, mandamus was held to be the proper remedy. President Nixon contended he was immune from the lawsuit under the separation of powers doctrine, as he contends here. But the court rejected the contention, concluding that the President was a necessary or indispensable party to the action in the sense that without his presence plaintiffs would be without remedy. Similarly, in *Nixon v. Sirica, supra,* the Court of Appeals affirmed the district court's denial of President Nixon's motion to quash a Grand Jury subpoena for the White House tapes. The court found that since the tapes were in the personal possession of the President, no other party could comply with the subpoena. Both courts expressed reluctance to directly confront or interfere with the Chief Executive, but neither was willing to exalt the generalized policies supporting judicial non-interference in the particular circumstances where a judicial remedy would be denied altogether or where the Grand Jury process would be thwarted.

However, where the same quality of necessity has not been demonstrated, other courts have declined to retain jurisdiction over a President. *See, e.g., Reese v. Nixon,* 347 F.Supp. 314 (C.D. Cal. 1972) rvsd. in part on other grounds No. 72-3070 (9th Cir. May 9, 1974); *Atlee v. Nixon,* 336 F.Supp. 790 (E.D. Penn. 1972); *San Francisco Redevelopment Agency v. Nixon,* 329 F.Supp. 672 (N.D. Cal. 1971); *Suskin v. Nixon,* 304 F.Supp. 71 (N.D. Ill. 1969).

Here, plaintiffs have alleged a conspiracy or a series of conspiracies, in which there are fifty-six other co-conspirators named as defendants, and more are said to exist. Plaintiffs seek compensation for what they characterize as the wrongs done to them by Mr. Nixon while President, but this compensation—judicial relief—can be afforded from any of the other named executive officials who are later found liable. Plaintiffs are entitled to the opportunity to obtain judicial relief,

and this will not be precluded. They are not, however, entitled to monetary relief from a former or a sitting President absent a clear showing of his indispensability to the lawsuit. Moreover, the correctness of Mr. Nixon's judgments as President may be evaluated as a by-product of determining the legal rights of the remaining defendants, as has taken place in other cases. *See, e.g., United States v. United States District Court,* 407 U.S. 297 (1972); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952); *Zweibon v. Mitchell,* 516 F.2d 594 (D.C. Cir.1975). Finally, this Court deems unpersuasive plaintiff's argument that the policies supporting judicial non-interference with Presidential decisions do not apply in a lawsuit against a former President, as here. If in the first instance one accepts the salutary principles of not giving judicial relief against a sitting President unless some clear showing of necessity is made—which this Court does—then it necessarily follows that plaintiffs should not be allowed to do indirectly what they could not have done directly, where no showing of necessity has been made. This lawsuit could not have been maintained against Mr. Nixon as an incumbent President; thus, no greater right to bring this lawsuit should now accrue to plaintiffs.

III.

For the foregoing reasons, the claims against Mr. Nixon must be dismissed, with prejudice. This Court finds that the ultimate termination of the litigation will not be advanced by the granting of an interlocutory appeal from this ruling; therefore, plaintiffs' request for this relief must be denied.

IT IS SO ORDERED.

DATED: June 16, 1976.

/s/ Howard B. Turrentine
Howard B. Turrentine,
United States District Judge

UNITED STATES DISTRICT COURT

Central District of California

Civil No. 73-2442-MML

JANE FONDA,

Plaintiff,

v.

RICHARD M. NIXON,
President of the United States; et al.,

Defendants.

Opinion Regarding Service of Process upon the President of the United States

[Filed May 23, 1974]

Jane Fonda, the well-known actress and critic of United States activity in Southeast Asia, began this suit in October 1973 to obtain remedies for the alleged infringements of her civil rights by government officers. Unlike many civil rights cases, brought against local government officials or minor federal officers, this one seeks redress against present or former high-level federal law-enforcement officers, members of the Cabinet, advisers to the President, and the President of the United States.

Fonda contends that the defendants conspired among themselves to deprive her of her civil rights. The complaint does not exhaustively delineate the conspiracy, but the plaintiff has furnished some details about her claim. According to Fonda, Presidential advisers drafted the Huston Plan, which the President approved, to encourage government action against political dissidents.[1] The Huston Plan is described in some White House documents, first revealed publicly during the Watergate investigations.[2] As outlined in these documents, the plan includes an increase in electronic surveillance of persons in the United States that posed a threat to internal security, relaxation of restrictions on legal mail coverage and on

covert mail coverage, removal of barriers to surreptitious entry of facilities occupied by persons, an increase in coverage of campus activity, and other measures. Some portions—specifically the surreptitious entry and covert mail coverage—were recognized as illegal. The Huston Plan is not the only action taken at the White House by which Fonda claims to have been affected. Fonda's name allegedly appeared in an "enemies list" at the White House, and memoranda concerning her were allegedly present in White House files. By these steps and perhaps by other maneuvers, Fonda claims, the officials at the White House either commanded the specific wrongs done to her or directed activity that established a pattern or practice of anti-dissident measures leading to these wrongs, or tolerated the custom of taking those measures against dissidents.[3]

The specific events described as wrongs done to her include seizures of her personal papers, opening of her mail; electronic surveillance of her telephone calls, procurement of information from her bank records and placement of false telephone calls to her to investigate her family's activities. These occurrences allegedly interfered with her exercise or her civil rights and civil liberties.

As relief she seeks compensatory damages, punitive damages from each defendant, an injunction, a declaratory judgment, and a writ of mandamus. The demand for damages forms a major part of the action; and the demand is for a considerable sum, a total of several million dollars.

From Richard M. Nixon, President of the United States, she demands relief of every kind, including damages. On President Nixon's behalf the government has moved for an order quashing the service of process upon him. Added to the motion is a request denominated as "suggestion for dismissal of this action as to the President of the United States," in which the government contends that this Court should dismiss the action on the Court's own motion.

The government contends that a United States court, organized pursuant to Article III of the Constitution, has no jurisdiction to entertain an action against the President. The government views him as immune from the judicial process

itself, not merely possessed of defenses on the merits against the action to be instituted, except in limited and narrowly defined circumstances. In support of the claim to immunity, the government cites the doctrine of separation of powers. The government also argues that subjection of the President to the legal process in suits for damages, injunctive relief, or declaratory relief would influence his administration of office and restrict his independence, in derogation of the Framers' design that there should be no infringement on his will and resolution. Such suits would not only dampen his ardor, but would also consume his personal time, the government fears, and with some justification. Consequently it urges not merely a dismissal on the ground that no relief can be obtained, but dismissal on the broader ground that no action can even be instituted.

By discussing the separation of powers, the government invokes the principle, included in the political question doctrine, that some matters are committed exclusively to branches of the government other than the judiciary. The government's argument resolves itself into the alternative contentions that a suit against the President necessarily concerns the use of power committed to that office or that the suit necessarily concerns the exercise of discretion belonging to that office.

Although a few cases do suggest that the judicial power does not extend to cases involving the President's power, those cases must be read carefully. In the early case of *Kendall v. United States*, 37 U.S. (12 Peters 524, 610 (1838), the court did proclaim:

> The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.

This discussion of Presidential power was not entirely necessary, since the President was not a party and the case did not concern Presidential conduct.[4] Nor should the quoted language be read as a statement that persons exercising powers granted by the Constitution are exempt from the legal process of the judiciary. The official whose action was the subject of the suit,

the Postmaster-General, tried to shroud himself with Presidential prerogatives by claiming that only the President could exert direction and control over him, so that the judiciary could not order him to take action. The court flatly rejected that contention:

> It would be vesting in the president a dispensing power, which has no countenance for its support, in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the president with a power entirely to control the legislation of congress and paralyze the administration of justice.

Id., 611. In so ruling, the court was implicitly declaring itself empowered to take jurisdiction and decide whether a particular function was one within the exclusive domain of the executive. The court's statement quoted earlier in the paragraph should be read in context to mean that the courts, taking jurisdiction, will decline to issue remedies interfering with certain executive powers, not that the court's process fails to reach the executive branch.

A good example of the political question doctrine, involving the exercise of Presidential power, is *Hobson v. Tobriner,* 255 F. Supp 296 (D.D.C. 1966), cited by the government. There the plaintiff filed a civil rights action to enjoin the appointment of commissioners for the government of the District of Columbia and to order elections instead. The court said that the relief demanded would invade the political power of Congress and the duty of the President. This decision reflects a judgment about the nature of the power committed to the President and the impropriety of relief, not merely a recognition that the President was involved. It does not reflect that belief that the mere presence of the President paralyzes the Courts. Like *Kendall,* it treats the separation of powers concept as a factor going to the judicial remedies rather than the availability of the judicial process.

Closely related to the argument that a power is reserved to the President is the contention that in certain matters he has a discretion reserved to him. This is reflected in the traditional

doctrine that the judiciary can control ministerial functions, but not discretionary ones, by mandamus or similar remedies. The use of Presidential discretion was the subject in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), another case cited by the government. The State of Mississippi sued to enjoin the President from executing the Reconstruction Acts, on the theory that they were unconstitutional. In reply the Attorney General argued explicitly that the suit was defective because the President could not be served with process. The court held that the President could not be enjoined, even if he could be sued, because that suit would interfere with his discretion in enforcing the law. Analogizing a suit to enjoin action to a suit for mandamus to compel action,[5] the court ruled that injunctive relief would not be issued to restrain the exercise of discretion just as a mandamus would not be issued to compel performance of a discretionary duty. The court never reached the question about service of process. Like cases about discretionary duty, *Mississippi v. Johnson* turned on the nature of the duty, not the fact that the President had that duty,[6] and it concerned relief rather than the service of process.

Landmark cases like *Kendall* and *Mississippi v. Johnson*, often cite in support of Presidential immunity, were really cases about remedies or subject matter only. The courts ruled only after consideration of the subject matter, the nature of the power and its exercise, not merely the identity of the defendant. The presence of a political question or other suggestions of a problem stemming from the separation of powers are matters going to the court's jurisdiction over the subject matter or the remedies, not one going to its power to serve process upon the President. This distinction was made in the recent cases of *National Treasury Employees Union v. Nixon*, No. 72-1929 (D.C.Cir. Jan 25, 1974, and *Nixon v. Sirica*, 487 F. 2d 700, 712 (D.C.Cir. 1973). It is implicit in *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1976).

The courts rather than the President will examine the power and decide whether the case involves political questions or unreviewable discretion. Even when a matter arguably is committed to another branch by the express language of the Constitution, the courts will inspect the subject matter to decide

whether it fits the terms of the commitment. See *Powell v. McCormack*, 395 U.S. 486 (1969).

These statements imply the rejection of any notion that the nature of a political question has anything to do with the service of process. The judiciary will use its process against an official. If he prevails because there is a political question or unreviewable discretion, his victory is due to the nature of the subject matter, not to his identity as an official. If the court finds neither a political question nor unreviewable discretion to bar jurisdiction, the court can act against the President. *National Treasury Employees Union v. Nixon, supra; see United States v. Burr*, 25 Fed. Cases 30 (No. 14, 692d) (C.C.D.Va. 1807). Certainly after the court decisions in *National Treasury Employees Union v. Nixon* and *Nixon v. Sirica*, the courts will exert the judicial process against the President and leave the argument about the separation of powers to the determination of subject matter jurisdiction or the propriety of relief.[7]

If court action always interfered with the President's performance of duties, making the President less zealous in his work and less effective in carrying out his *proper* Constitutional functions, that might be good reason to limit his exposure to suits. But interference with Presidential action is not always so deleterious. Some interference of one branch with another is a part of the system of checks and balances by which each branch restrains the others. As Justice Brandeis observed:

> The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 203 (1927) (dissenting opinion). Action not in accordance with the Constitution or the statutes is not merely action beyond the declared limits of authority; as the District of Columbia Circuit said:

> ...[T]here is serious questions whether presidential actions inconsistent with congressional mandates constitute effective Government.

National Treasury Employees Union v. Nixon, supra, 46. The interference may benefit the nation in the long run, and the Constitution looks to the long run.

A similar analysis applies to the contention that judicial action interferes with a President's electoral mandate. An electoral mandate may prescribe the policies to be followed in formulating regulations and implementing law or in recommending to Congress some changes in the law, but it provides no authority to brush aside the law and it especially provides none to brush aside Constitutional rights. The electoral mandate does not define the office or its powers, but merely instructs the occupant on how to perform the duties of office.[8] The occupant must work within the framework of the office. Judicial action restraining him to the confines of the office does not interfere with the genuine electoral mandate. A certain amount of interference with the President's activity may conceivably be desirable.

A corollary to that is the proposition, which the Court recognizes, that some lawsuits seek not to restrain actions which are in fact illegal, but to affect action that is in fact within the President's authority. If a court should render preliminary relief, such as a temporary restraining order or injunction, that would effectively stop the President from carrying out duties. The fear of a successful suit for damages would have a chilling effect on the President's vigorous performance of his functions. The potential effect on the President's action calls for safeguards against the institution of suits which would affect him in his proper role. For that purpose the courts have developed devices such as the defense of official action. E.g., *Bivens v. Six Unknown Named Agents,* 456 F. 2d 1339 (2d Cir. 1972); *Gregoire v. Biddle,* 177 F. 2d 579 (2d Cir. 1949), *cert. den.,* 339 U.S. 949 (1950). The defense is not stated identically for each officer, and the range of activity swept within it varies considerably for each officer. But the scope of the immunity is measured by the official's function, not by his identity. In *Barr v. Matteo* 360 U.S. 564, 573-4 (1959), the court said in this regard:

> It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrasted—the relation of the act complained of to "matters committed by law to his control or supervision," *Spalding v. Vilas, supra,* [161 U.S.] at 498,—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

The defense does not entirely insulate an officer from a lawsuit, but only protects him from certain ones. The judiciary decides whether he has its protection in a particular case. In making the decision, the judiciary starts from the premise that the official is exposed to the judicial process. Within the legal process he has a shield against the plaintiff's complaint, but he does not have a shield against the legal process itself.

The legal process does require the time and attention of litigants. If numerous suits were brought against a President, and especially if they were suits for money damages, the President might find his personal time consumed by conferences with counsel, by furnishing information in discovery, and by similar matters. More than any other official, the President has to have the maximum use of his working time. For this reason the courts have protected the President's time by preventing suits from going forward if the litigant has adequate recourse by suits against other officials. But like the defense of official immunity, this doctrine is not armor against the legal process but merely a part of the legal process to be applied. The distinction between a defense within the legal process and a defense to the process stands forth in Chief Justice Marshall's opinion as a Circuit Judge in *United States v. Burr,* 25 Fed. Cases 30 (No. 14, 692d) (C.C.D. Va. 1807). On trial for treason, Burr sought a subpoena duces tecum to compel the President to produce a letter written by General Wilkerson to the President, Thomas Jefferson. The court considered the relation of the subpoena to the use of the President's time and rejected consumption of time as a defense to the simple issuance of a subpoena:

> If, upon any principle, the president could be construed to stand exempt from the general provisions of the

> constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court than a reason against its being issued. . . . The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued.

The subpoena was issued, and Jefferson did provide the letter. The court recognizes the President's needs and interests by preventing disclosure of much of the letter in open court. Marshall required him to trust the judicial machinery, not to ignore it.[9] His decision refutes the government's theory that consumption of the President's time is a ground for immunizing him totally from the judicial process itself.

The President is not sovereign; the nation is. Through the Constitution the nation did not give sovereign power to the President. Nor does his political mandate constitute a grant of sovereign power. *Nixon v. Sirica, supra; United States v. Burr, supra.* The tenets of a republican form of government include surely the principles that officers are distinct from their offices and that officers are subject to the law. As Justice Jackson remarked, "With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . . ." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 655 (1952) (concurring opinion), quoted in *Nixon v. Sirica, supra.* He is not above the command of the law, and no express guarantee in the Constitution exempts him from the conventional legal process. In *National Treasury Employees Union v. Nixon, supra,* and in *Nixon v. Sirica, supra,* the courts declared him subject to that process.

But as the Court has noted, the judiciary has developed techniques for the President to avoid the harassment of useless lawsuits. The concept of justiciability restricts their subject

matter; the defense of official action protects officers acting within their authority. In addition, because the President's time is uniquely precious, the courts have been reluctant to permit a suit against him if a suit can be brought against another official instead. In the recent cases holding him subject to legal process and rendering decisions against him, the courts have observed that the President was in fact indispensable. In *Nixon v. Sirica* the President had interposed himself by taking personal control over the property sought in a subpoena. The court could give no relief except relief against the President. In *National Treasury Employees Union v. Nixon,* the petitioner sought mandamus to compel performance of a duty imposed on the President and not delegated by him to any subordinate; again the only possible relief was relief against the President.[10] But in both cases the courts adverted to the policy against unnecessary suits. In *Nixon v. Sirica, supra,* 709, the court said:

> As a matter of comity, courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President. Here, unfortunately, the court's order must run directly to the President, because he has taken the unusual step of assuming personal custody of the Government property sought by the subpoena.

The District of Columbia Circuit underscored its distaste for unnecessary suits when it stated:

> There is also little doubt that if it were possible for NTEU to enforce its rights by naming a defendant additional to or in substitution of the President, this Court would exercise its discretion not to answer the question of whether the President is subject to mandamus by a federal court to perform a purely ministerial duty.

National Treasury Employees Union v. Nixon, supra, 35. Litigants have succeeded in keeping the President in a lawsuit only when no alternative slate of defendants was available.

But in this action, a raft of defendants are present. The caption names twenty defendants besides Nixon, including two banks and a host of government officers. Since the activity that allegedly harmed Fonda necessarily involved persons besides

for such a case to be known by the name of a party no longer in it. The Court therefore strikes the name of Richard M. Nixon, President of the United States, from the caption. The case shall hereafter be designated "Fonda v. Gray, et al," the name of L. Patrick Gray being the one listed next in the caption.

In the event of a decision adverse to her, Fonda has requested a certification for an immediate appeal under 28 U.S.C. § 1292(b). The Court grants that request.

Dated May 23, 1974

/s/ Malcolm M. Lucas
Malcolm M. Lucas
United States District Judge

Footnotes

[1] The specific details appear in an affidavit filed by Leonard I. Weinglass, one of Fonda's attorneys, in opposition to a motion by Huston for dismissal. An unsigned copy was filed on March 4, 1974; the signed copy, with corrections, was filed on March 5, 1974.

[2] Copies are attached to the Weinglass affidavit.

[3] See ¶ 42 of the complaint.

[4] The official involved, the Postmaster General, did not have only Constitutional functions. The court held that he had statutory powers as well. The statutory powers were certainly subject to control through mandamus, the remedy sought in the case.

[5] The analogy is now rather doubtful. Injunctions can be used to restrain officials from executing a law when that law is unconstitutional. E.g., *Ex Parte Young*, 209 U.S. 123 (1908). The courts do not accept the theory that an officer has discretion to decide whether a law is valid. The courts decide it for him.

[6] The power of the President is not made discretionary simply because the President possesses it. *National Treasury Employees Union v. Nixon, infra.*

[7] For the proposition that the President enjoys a total exemption from the jurisdiction of the courts, the government cites, in addition to *Hobson v. Tobriner* and *Mississippi v. Johnson*, the recent cases of *Davis v. Nixon*, No. 73-1520-LTL(G) (C.D.Cal., Nov. 29, 1973) (Lydick, J.); *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971); *Reese v. Nixon*, 347 F. Supp. 314 (C.D. Cal. 1972) (Hauk, J.), *aff'd on other grounds as to the dismissal of the*

action against the President, No. 72-3070 (9th Cir. May 3, 1974) (unpublished opinion); and *Suskin v. Nixon*, 304 F. Supp. 71 (N.D. Ill. 1969). The judge in *Davis* wrote no opinion, and so there is no written description of his reasons for dismissal. In *San Francisco Redevelopment Agency*, a suit for mandamus to compel the release of money, the court dismissed the action against the President and quashed service of process because no authority supported the proposition that a court could compel Presidential action. The District of Columbia Circuit has subsequently provided that authority in *National Treasury Employees Union v. Nixon, supra.* To the extent that *San Francisco Redevelopment Agency* relates the questions about propriety of compelling action to the validity of service of process, is undercut by the recent District of Columbia Circuit cases distinguishing between the power to consider certain subjects and the service of process on the President. In *Reese*, the District Court decided it had no jurisdiction over the President because of the separation of powers, and in *Suskin*, the court quashed service of process because the power involved—that of formulating standards under the draft law—was discretionary. The recent District of Columbia decisions, distinguishing between problems with the subject matter and the service of process, undercut these opinions. The Court follows the recent District of Columbia rulings.

[8] The government identifies the holder with the office. But the distinction between an office and its holder is a basic theme of the political history of the last several hundred years. The Court does not accept the government's view.

[9] To some extent, the language in *Burr* is undercut by the fact that a United States Attorney had conceded that a subpoena could be issued. The United States Attorney had denied only the propriety of issuing a subpoena duces tecum. The distinction between the two forms if flimsy, and Marshall noted that.

[10] The same was true in *Minnesota Chippewa Tribe v. Carlucci, supra.* Seeing no possible relief except relief against the President, Judge Green denied a defense motion to dismiss as to the President. However, the case has not proceeded to a decision on the merits, so far as the Court knows.

[11] Conceivably, the alleged wrongdoers would be within the scope of their authority for the purposes of 28 U.S.C. § 1946 outside of the exceptions enumerated in 28 U.S.C. § 2680. Section 2680(h) does exclude claims such as assault, battery, false arrest, and malicious prosecution, but the alleged actions do not clearly fall within

§ 2680(h). As the Senate Government Operations Committee recently concluded, "[U]nder the Federal Tort Claims Act, Government tort liability for intentional conduct is unclear. For example certain intentional torts such as trespass and invasion of privacy are not always excluded from Federal Tort Claims Act coverage." S. Report 93-588 (No. 29, 1973). This report is part of the legislative history behind P.L. 93-253, 88 Stat. 50 (March 16, 1974), which adds this language to § 2680(h):

> *Provided*, that with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

This enactment was intended not merely to repeal the exception for most cases of the torts specifically listed in § 2680(h), but also to clarify the status of torts not listed, such as invasion of privacy. "Obviously, it is the intent of the Committee that these borderline cases under the present law, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the Federal Tort Claims Act, if the amendment is adopted." S. Report 93-588. Although the new proviso applies by its own force only to cases arising after March 16, 1974, it may be a guide in interpreting the prior law about the non-listed torts. It is possible that the Government bears liability for the conduct behind Fonda's claims. The Court expresses no opinion on the matter.

[12] The Court renders no opinion on whether the plaintiff could sue Nixon after he leaves office nor on the running or tolling of the statute of limitations. These questions are not before this Court. Nor does the Court express any opinion on whether President Nixon would be protected by the defense of official action.

UNITED STATES DISTRICT COURT

Central District of California

Civil No. 73-1520-LTL(G)

ELMER DAVIS,

Plaintiff,

v.

RICHARD M. NIXON,
President of the United States of America, et al.,

Defendants.

Order Dismissing Complaint as to Certain Defendants

Pursuant to Title 28 U.S.C. § 636(b)(3), attached is the Report and Recommendation of the United States Magistrate who has reviewed the complaint and amended complaint filed herein for relief under the Civil Rights Act, together with the motion to dismiss as to various defendants, and the plaintiff's opposition thereto.

The Court has reviewed the foregoing and the objections to the Report and Recommendation of Magistrate Ralph J. Geffen and concurs with and adopts the findings and conclusions of the Report and Recommendation.

IT IS ORDERED that the motion to dismiss the amended complaint is granted as to Defendant Richard M. Nixon, President of the United States of America, and that the motion to quash the service of summons on said defendant, and to strike his name from all pleadings is denied, without prejudice to renewal at a later date.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order by United States mail, upon the plaintiff, upon La Follette, Johnson, Morgan & Robinson, counsel for defendants-Cork, Campbell and Franklin, and upon the United States Attorney, counsel for the remaining defendants.

DATED: June 18, 1974.

/s/ Lawrence T. Lydick
Lawrence T. Lydick
United States District Judge

UNITED STATES DISTRICT COURT

Central District of California

Civil No. 73-1520-LTL(G)

ELMER DAVIS

Plaintiff,

v.

RICHARD M. NIXON,
President of the United States of America, et al.,

Defendants.

Report and Recommendation as to Civil Rights Complaint

Plaintiff, a state prisoner, appearing *in forma pauperis* and without counsel, has brought this civil rights action for damages against (A) the President of the United States, Richard M. Nixon, (B) four of the presidential "advisors", "aides" and "consultants", John D. Ehrlichman, Egil (sic) Krough, E. Howard Hunt, and G. Gordon Liddy, and (C) three officials of the Beverly Hills Police Department, B. L. Cork, Bruce Campbell, and W. L. Franklin.

Jurisdiction is alleged under provisions of the civil rights acts, 42 U.S.C. §§ 1983, 1985 and 1986 [*Haines v. Kerner,* 404 U.S. 519 (1972);] via 28 U.S.C. §§ 1331 and 1343(3) and (4), and may also be present under the Fourth and Fifth Amendments [cf. *Bivens v. 6 Unknown Named Agents,* 403 U.S. 388 (1971) via 28 U.S.C. § 1331(a).

An order was made by the United States Marshal for service of the original complaint upon the defendants without prepayment of fees. However, service has not been accomplished as to any of them except the last-named group, and in the case of defendant Nixon the United States Marshal for the District of Columbia declined to make service on the grounds that he had "no authority to serve the President", and that "the President of the United States is not amenable to service of process and is not subject to any court for the exercise of his powers whether constitutional or statutory, political or otherwise."

An amended complaint was subsequently filed. No order for service thereof has been made, and it has not been served on any of the defendants excepting defendants Cork, Campbell and Franklin, who have filed an answer thereto.

On September 24, 1973, a Notice of Motion was filed by the United States Attorney on behalf of defendant Nixon

(1) seeking that service of summons directed to defendant Nixon be quashed, and

(2) suggesting that the action be dismissed as to defendant Nixon.

An amended Notice of Motion to the same effect was filed by the United States Attorney on behalf of defendant Nixon on October 17, 1973. Although this preceded the filing of the amended complaint, an order was made by the Magistrate on November 17, 1973 that this motion remain on calendar. Hearing was had thereon on November 26, 1973. Plaintiff did not appear and was not represented, but did file opposition to the motion, presenting a well-drawn memorandum of points and authorities in support of his position.

The scope of the hearing was confined to an explanation by the United States Attorney of the legal grounds relied upon for his motion. They included the following points:

(1) A federal officer is not liable to suit under 42 U.S.C. §§ 1983 or 1985;

(2) The President is immune from civil suit for acts within the scope of his authority;

(3) There is no jurisdiction of the action because diversity of citizenship is not alleged.

Of these, (1) and (2) were specified in the notice of motion.

A great deal of research has been done as to the principle that the separation of powers doctrine militates against the assertion of jurisdiction by the judicial branch over the person of the head of the Executive Branch. This Court has stated that principle in *Reese v. Nixon*, 347 F.Supp. 314 (C.D. Cal. 1972),

affirmed and reversed, in parts, #72-3070, unpublished Memorandum, May 3, 1974. Accord, *San Francisco Redevelopment Agency v. President Richard M. Nixon*, 329 F.Supp 672 (N.D. Cal. 1971); *National Association of Internal Revenue Employees v. Nixon*, 349 F.Supp. 18 (D.D.C. 1972); *Trimble v. Johnston*, 173 F.Supp. 651 (D.D.C. 1959).

An analysis of the first cause of action of the amended complaint, which, as a *pro se* pleading, is to be liberally construed [*Haines v. Kerner*, 404 U.S. 519 (1972)], indicates that it charges only defendants Cork, Campbell and Franklin with any conduct. The conduct complained of is that these defendants, under color of state and federal law, invaded plaintiff's right of privacy by publicly making false statements that plaintiff had confessed to burglary of the offices of a Dr. Lewis J. Fielding (the "Ellsburg burglary"), with intent to cause his false arrest and imprisonment and involve him in such "scandal", in violation of his rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution; as a result, plaintiff alleges, he was humiliated and sustained mental pain and suffering. (Amend. Complt., p. 1-p. 5, l. 12.)

The second cause of action includes claims against *all* of the defendants. It designates defendant Nixon as the President of the United States, defendant John D. Ehrlichman as "Presidential Advisor", defendant Egil Krough (sic) as "Presidential Aide", and defendants E. Howard Hunt and G. Gordon Liddy as "Presidential Aides and Consultants"; the four last-named are described as "officials of the United States Government in an appointive capacity." (Amend. Complt., p. 5, 11, 15-19; p. 1, l. 1-p. 2, 11. 1-6, 16-31.) All of the defendants are alleged to have acted under the color of state and federal law. (Amend. Complt., p. 3, 11. 8-11.)

The second cause of action, imperfectly drawn, clearly intends to charge a conspiracy by all defendants, directed at plaintiff, to make plaintiff a "scapegoat" "to cover for themselves in their own criminal acts of conspiracy to commit" the so-called "Ellsburg burglary" by "falsely accusing the Plaintiff of having 'confessed' to said crime; the alleged intent was to

thereby bring about the conviction of Plaintiff for the alleged commission of said crimes and to cover for the Defendant-Government officials' involvement in said crimes, in direct violation of the Plaintiff's Constitutional Rights as guaranteed under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. (Amend. Complt., p. 6, l. 11-p. 7, l. 5.)

In support of this broad claim, the second cause of action alleges that "Defendant Richard M. Nixon, the President of the United States of America, acting through and by his agents and representatives Defendant Egil Krogh, E. Howard Hunt, and G. Gordon Liddy, and others under the guise of domestic security "conspired to commit the 'Ellsburg burglary' ", and in pursuance thereof defendants Hunt and Liddy, utilizing equipment supplied by the Central Intelligence Agency, committed the burglary. (Amend. Complt. p. 5, l. 21-p. 6, l. 10.)

He further claims that at a later date he was subsequently arrested and prosecuted for an unrelated burglary by defendant Franklin "and others", that defendant Franklin attempted to get plaintiff to admit to that burglary "and other unspecified burglaries in the Beverly Hills area" which plaintiff denies committing; that defendant Franklin testified against him at the preliminary hearing in that case and his testimony was based largely upon "an unsigned and manufactured confession", resulting in plaintiff's being bound over for trial. As a further result of defendant Franklin's alleged perjury[66] and conspiring to commit those crimes in consort with the Defendant Bruce Campbell, and others . . . in furtherance of . . . the conspiracy to make the Plaintiff the 'scapegoat' for the (Ellsburg burglary) and to bring about his conviction on (the unrelated burglary), the Plaintiff was convicted of (the unrelated burglary)." (Amend. Complt. p. 7, l. p. 9, l. 6.)

Plaintiff alleges that as further overt acts in furtherance of "the herein complained of conspiracy" defendant Cork publicly accused plaintiff of confessing to the Ellsburg burglary a month after it occurred, stating that it allegedly occurred while plaintiff was looking for narcotics; and that David Nissen, "United

States Prosecuting Attorney" in *United States v. Russo,* Crim. No. 9373, "in the Pentagon-Papers Trial", introduced into evidence in that case certain evidence relating to plaintiff "while withholding other equally relevant evidence ... that would have proven that the Plaintiff had not committed the (Ellsburg burglary) ... with the intent to make it appear that the Plaintiff had actually committed the said criminal offense in order to obstruct justice and have the Plaintiff convicted of the said crime ... and/or in the alternative cast him in a bad light before the eyes of the public ...." (Amend. Complt., p.9, l. 7-p. 10, l. 14.)

It is alleged that as a further act in furtherance of the "conspiracy", "Defendant Richard M. Nixon, President of the United States of America", and "John Ehrlichman, Presidential Advisor/Defendant" invited the presiding judge at the "Pentagon-Papers" trial to the Western White House for the purpose of offering him "the bribe of a position with the Federal Bureau of Investigation as its Director" with the "malicious intent of influencing the outcome of the Pentagon Papers Trial" and "securing the conviction of Daniel Ellsburg and Anthony F. Russo" and "substantiating the Plaintiff's alleged involvement in the (Ellsburg burglary)." (Amend. Complt. p. 10, l. 16-p. 11, l. 4.)

Lastly it is charged that in furtherance of the alleged conspiracy defendants Cork, Campbell and Franklin falsely testified before the Los Angeles County Grand Jury in June 1973, regarding the "Ellsburg burglary", "in support of their statements and accusations previously made accusing the plaintiff of having confessed to the (Ellsburg burglary)." (Amend. Complt. p. 11, 11, 5-29.)

Plaintiff seeks substantial damages in this action, and demands a jury trial.

It is concluded that the amended complaint is, as to defendant Nixon, for conduct allegedly engaged in by him in his capacity as President of the United States, and that, at least as to this defendant, the amended complaint fails to state a

claim cognizable in a federal court. His entry into the conspiracy alleged was purportedly in the pursuit of "domestic security."

"It is not within the province of the courts to inquire into the policy underlying action taken by the political departments—Congress and the President—in the exercise of their conceded powers." The Constitution of the United States of America, Senate Doc. # 39, 88th Congress, 1st Session, p. 524.

The President is "beyond the reach of judicial direction in the exercise of any of his powers, whether constitutional or statutory, political or otherwise," op. cit., at 553-54, citing *State of Mississippi v. Johnson,* 71 U.S. 437 (4 Wall 475(1867) [in which an injunction against enforcement by the President of an Act of Congress was denied.]

See, however, *Scheuer v. Rhodes,* ____ U. S. ____, April 24, 1974, in which the Supreme Court said:

> "Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' *Sterling v. Constantin,* 287 U.S. 378, 397 (1932)."

In a recent unpublished opinion, the Ninth Circuit Court of Appeals said,

> "We do not reach the question whether the district court has power to assert jurisdiction over the President because we agree with the district court that no claim for relief has been or can be stated against the President under the doctrine of executive immunity explicated in *Barr v. Matteo* (1959) 360 U.S. 564 and *Scheuer v. Rhodes* (1974) ____ U.S. ____. (See also *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (2d Cir. 1972) 456 F.2d 1339.)" *Reese v. Nixon,* # 72-3070, Memorandum, May 3, 1974, affirming and reversing, in parts, 347 F. Supp. 314 (C.D. Cal. 1972).

On the other hand, by common law principles, a subordinate executive officer is personally liable under the ordinary law for any act done in excess of authority, op. cit., at 555, citing *Little v. Barreme*, 2 Cr. 170 (1804); *United States v. Lee*, 106 U.S. 196 (1882); *Spaulding v. Vilas*, 161 U.S. 483 (1896). The federal district court has jurisdiction to entertain such suits [*Bell v. Hood*, 327 U.S. 678 (1946)], and may now award damages for violations of constitutional rights, in appropriate cases [*Bivens*, supra], unless there is official immunity for the acts complained of. [Cf. *Reese v. Nixon*, 347 F.Supp. 314, 317-18 (C.D. Calif. 1972), affirmed in part and reversed in part, in an unpublished opinion (9th Cir. May 3, 1974).]

Dismissal of the complaint as to the President is therefore appropriate. Holding the President liable for damages for his past official conduct would be as much of an interference with the Executive Branch as would be the enjoining or mandating of future acts.

Granting of the motion to quash the service of process is inappropriate, since there has been no service made upon him. No good cause is shown for striking the name of defendant Nixon from the pleadings, and no authority or argument thereon has been put forward by the moving party. Since defendant Nixon's name is the first to appear, it would cause some confusion in court records to now strike that name from all pleadings. If this matter were to come to trial before a jury, good cause might then exist, and the motion could then be renewed.

IT IS THEREFORE RECOMMENDED that the motion to dismiss the complaint be granted as to defendant Richard M. Nixon, President of the United States of America, and that the motion to quash the service of summons on defendant Nixon and to strike his name from all pleadings be denied, without prejudice.

DATED: May 24, 1974

/s/ Ralph J. Geffen
Ralph J. Geffen

Do Not Publish

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

No. 72-3070

THOMAS REESE, et al.,

Plaintiffs,

vs.

RICHARD M. NIXON, et al.,

Defendants.

Memorandum

[May 3, 1974]

Appeal from the United States District Court
for the Central District of California

Before: ELY, HUFSTEDLER and SNEED,
Circuit Judges

The district court erred in dismissing this civil rights action without leave to amend. Although the complaint's general allegations of conspiracy, purpose, intent, and color of authority are vague, conclusory, and rambling, they are adequate to withstand a motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure. A civil rights action may not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41. . . . " (*Cohen v. Norris* (9th Cir. en banc 1962) 300 F.2d 24, 31; *accord, Haines v. Kerner* (1972) 404 U.S. 519.) The complaint does fail to set forth the overt acts of the defendants in furtherance of the objects of the conspiracy. (*Hoffman v. Halden* (9th Cir. 1959) 268 F.2d 280, 295-96,

overruled on other grounds, Cohen v. Norris, supra.) However, to the extent that further particularity is needed, the defendants can move for a more definite statement under Rule 12(e), Federal Rules of Civil Procedure.

Even if the motion to dismiss had been properly granted, the district court abused its discretion in rejecting appellants' request to amend the complaint. (*See generally Foman v. Davis* (1962) 371 U.S. 178.)

The district court properly dismissed the fictitiously named defendants under Rule 4(j) of the Local Rules of the United States District Court, Central District.

We do not reach the question whether the district court has power to assert jurisdiction over the President because we agree with the district court that no claim for relief has been or can be stated against the President under the doctrine of executive immunity explicated in *Barr v. Matteo* (1959) 360 U.S. 564 and *Scheuer v. Rhodes* (1974) ____ U.S. ____ (*See also Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (2d Cir. 1972) 456 F.2d 1339.)

The doctrine of executive immunity, however, is inadequate at this stage of the case to insulate the remaining federal and state officials named as defendants. Executive officials do not possess an absolute and comprehensive immunity as to all acts allegedly performed within the scope of their official duty. (*Scheuer v. Rhodes, supra,* at ____.) An official is immune only if he performs "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority" (*Barr v. Matteo, supra* at 575 (Harlan, J.)) and only when the act complained of is "within the outer perimeter of [his] line of duty" *(id.)*. A determination as to the applicability of executive immunity to the named defendants other than the President cannot be made in the absence of a factual record, because the extent of the qualified immunity to which the defendants are entitled depends upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It

is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct." (*Scheuer v. Rhodes,* supra at ____.) The record is far too unclear presently to ascertain which official or officials acted within the range of discretion permitted the holders of particular offices and acted in good faith. The plaintiffs are entitled to be heard more fully than is possible on a motion to dismiss a complaint. (*See id.* at ____.)

The prosecutors are not immunized from suit unless the acts complained of took place as an integral part of judicial process. (*Donovan v. Reinbold* (9th Cir. 1970) 433 F.2d 738, 743-44; *Robichaud v. Ronan* (9th Cir. 1965) 351 F.2d 533, 536.) Until the record is more fully developed, it is not possible to determine whether immunity extends to the prosecutors named as defendants.

The record is also too poorly developed to sustain a conclusion that abstention is appropriate in respect of defendant Flournoy. The suggestion that defendant Flournoy is being sued for his role as state tax collector in the process of collecting taxes is no more than conjecture.

Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with the views herein expressed.